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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

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No. 28.

ALICE A. CABLE, Administratrix of the Estate of **HERMAN D. CABLE,** deceased,
Petitioner,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT OF WILLIAM G. BEALE FOR RESPONDENT.

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STATEMENT.

The statement of the case in the brief of counsel for the petitioner is not quite satisfactory to counsel for the respondent, particularly in not seeming to be sufficiently full upon certain points deemed material, and, therefore, it is thought best to present here a complete statement of the proceedings had in the courts below, and of the facts under review. It is believed that at least the convenience of the court in its consideration of the record will be thereby promoted.

THE CASE.

Two general questions are involved: First, whether the Circuit Court committed reversible error in exercising its equitable jurisdiction; and second, whether it committed reversible error in its decree upon the merits.

On the 11th day of May, 1899, respondent filed in the Circuit Court of the United States for the Northern District of Illinois its original bill for the cancellation of an insurance policy written upon the life of Herman D. Cable, and for an injunction against a threatened action at law upon the policy. The bill alleged, in substance, that on February 24, 1899, after the policy had been written, but was yet undelivered and unaccepted, Herman D. Cable became ill of pneumonia; that on February 27, 1899, while he was in the throes of that disease, and three days before his death resulting therefrom, which occurred March 2, 1899, his friend George S. Lord paid the first premium and obtained the policy from the company by fraudulently concealing the

illness; that the company had no knowledge of Cable's illness until his death, when it tendered back the premium with interest and demanded a return of the policy, which was refused; that among the conditions contained in the application for the policy there was one that the policy should take effect only in case of its delivery during the sound health and insurable condition of the insured; that under the circumstances the policy never took effect; and that the policy was at the time of the filing of the bill in the hands of the defendant, who was demanding payment of it. On the day the bill was filed a motion for a preliminary injunction was also filed, application was made and granted for a temporary restraining order pending a hearing upon the motion, and a chancery subpœna was issued and served upon petitioner. Upon the same day, but, as it happened, about an hour or an hour and a half before the filing of the bill, petitioner began the threatened action at law against respondent, in a state court of Illinois, (the Superior Court of Cook County), in said district, in the usual manner by causing a summons to be issued, and four days later, May 15, 1899, the summons in the action was served upon the respondent. Subsequently, an amended and supplemental bill was filed,—the supplemental matter setting forth the actual commencement of the action at law, and the service of process in both proceedings. The bill also contained allegations, to which particular attention will presently be called, setting up special circumstances to establish that the complainant was without plain, adequate and complete remedy at law, and especially so in the federal court. A demurrer was interposed to this amended and supplemental bill, and upon argument the demurrer was sustained, the motion for a preliminary injunction was de-

nied, the temporary restraining order was vacated, and the bill was dismissed. Upon appeal the decree dismissing the bill was reversed, and the suit was remanded for further proceedings. (*United States Life Ins. Co. in the City of New York* v. *Cable,* 39 C. C. A., 264; 98 Fed., 761; printed in an appendix to this brief.) The cause having been redocketed, the defendant filed her answer, claiming that the policy was delivered to Lord by complainant's agent, who was at the time fully informed of Cable's illness, and that the delivery of the policy bound the company. No further injunction was issued or applied for. After the filing of a replication the cause was referred to a master in chancery, with directions merely "to take the evidence in said cause and to report the same" to the court. (*Rec.*, 32.) In addition to taking and certifying the evidence, the master made a report containing his findings and conclusions as to the facts. (*Rec.*, 34.) The order of reference did not authorize the master to make any findings, and consequently the report was merely advisory to the court, was not formally in the case as a matter to be acted upon, and carried no technical legal presumptions in its favor. Exceptions to it, even if proper, being unnecessary to insure consideration of the case upon the entire evidence no exceptions were filed on behalf of the complainant, though the report, while in the main correct, was objectionable in respect of one finding hereinafter mentioned. The defendant filed exceptions, and the court in its decree passed upon them. After final hearing upon the pleadings, the report and the evidence, the district judge read and handed down a written opinion as follows (*Rec.*, 183; in cross-appeal, cause number 775):

> "In this case I am of the opinion that as a matter of law the delivery of the policy in question herein

was not consummated until its receipt by Mr. Lord, and that at the time of such delivery he did not, as a matter of fact, fully disclose to the agent of complainant, who brought the policy to him, the serious nature of the illness of defendant's decedent. The evidence discloses no intentional fraud on the part of Mr. Lord in this regard, but simply that in the hurry of business his remarks as to the illness of Mr. Cable were not sufficient to apprise the agent of the complainant of the nature of such illness, which was a material matter affecting the intended contract between complainant and Mr. Cable which was to be evidenced by said policy. On this ground I am of the opinion that the delivery of said policy to Mr. Lord was induced by what in law should be considered constructive fraud. A decree may be prepared in accordance with the foregoing opinion, directing the cancellation and delivery to complainant of the policy in question upon the payment by complainant of the premium received by it on account thereof. The costs of this proceeding will be taxed against the defendant."

The decree, subsequently entered (*Rec.*, 147), granted the relief sought by respondent, except that no injunction was ordered against petitioner to restrain her from prosecuting her action at law. The petitioner was left free to carry on her proceeding in the state court, but jurisdiction was reserved in the decree for any future steps necessary to execute it. In order to support the conclusion that, while there was a concealment of material fact constituting fraud, the fraud was *merely constructive*, the court incorporated in the decree certain findings of fact, which, it was contended by complainant's counsel, were unwarranted by the evidence. These findings were, in substance, (1) that at the time of the delivery of the policy by McCabe, an insurance broker, to Lord, the latter told McCabe "that Cable had been sick for two or three days, but was no worse than he had been for the past forty-

eight hours"; (2) that such statement was made by Lord "in good faith and without any intention to defraud the complainant or conceal the real condition of the health of said Cable"; and (3) that "no actual fraud was intended or practiced" in the delivery of the policy. The master had taken a different view of Lord's intent in making the statement above referred to, and the decree modified the report to make it conform to these findings of the court, and approved it as thus modified.

To that modification and to those findings by the court the complainant excepted (Rec., 155), believing that the evidence showed a deliberate and intentional concealment on the part of Lord, and, therefore, a plain fraud perpetrated by him. The defendant upon taking her appeal did not assign errors to the *findings*, and it therefore appeared to complainant's counsel to be a matter of some doubt whether *upon that appeal alone* the Circuit Court of Appeals would review the findings, or consider them open for discussion, or would regard itself bound by them; and, in the latter event, whether they would prejudice the complainant's case for the *relief* sought. To avoid possible question of this kind the complainant took its cross-appeal from that part of the decree making the *findings* above specified (*Rec.*, 185), so that the cause might be heard and considered in the Circuit Court of Appeals upon the whole evidence, regardless of the findings of the master and of the Circuit Court. The original appeal (No. 762), and the cross-appeal (No. 775), were heard together as one case and were disposed of by one decision. (*Rec.*, 162; 49 C. C. A., 216; 111 Fed., 19.) The record here covers both the original appeal (*Rec.*, 1-178), and the cross appeal (*Rec.*, 179-194), which latter may, if necessary, be considered by this court, under a stipulation heretofore filed. (*Rec.*, 196.)

THE FACTS.

In January, 1899, T. J. Finney, an independent life insurance broker in Chicago, having no agency relation with any insurance company, undertook to place insurance upon the lives of George S. Lord and Herman D. Cable, residents of Evanston, who were neighbors and intimate friends, and were jointly interested in several business enterprises. Having by correspondence with Lord and Cable paved the way for the work of a solicitor, Finney employed James F. McCabe, another insurance broker (having also an agency for the Washington Life Insurance Company, but having no connection with respondent or its general agent (*Rec.*, 75, 77), to procure the applications. (*Rec.*, 79.) McCabe was probably employed for this service because, in the previous year, he had been successful in soliciting from the same men life insurance which had been placed in another company and had lapsed. (*Rec.*, 81, 82.) Subsequently, Finney, upon his own initiative, also arranged with J. H. Strong, the respondent's general agent in Chicago, as to the commissions which would be allowed him (Finney), in case he should bring the insurance to respondent. (*Rec.*, 70, 79.) Lord and Cable contemporaneously made separate formal applications, in writing, through McCabe, for insurance by respondent. (*Rec.*, 103.) Cable's application was dated January 16, 1899, and the medical examiner's report appearing upon the back thereof was dated January 17, 1899. (*Rec.*, 145.) The two applications were delivered to Mr. Strong and were by him forwarded to the home office of respondent in New York, to be passed upon, and, on February 20, 1899, Strong received from that office two

policies, for $50,000 each, written pursuant to the applications, the two policies being similar in form and calling for the same kind of insurance. (*Rec.*, 47.) Cable's policy was dated February 6, 1899, was payable to his "estate" (*Rec.*, 9), and was identical in form and in its general provisions with Lord's. (*Rec.*, 103.) On February 21, Strong turned the policies over to Finney for delivery, taking Finney's receipt therefor (*Rec.*, 77), and charging Finney with the first premium on a "tickler," which, by the custom of the business, would be cancelled if the policies should be returned undelivered. (*Rec.*, 78.) On the same day Finney turned them over to McCabe, with instructions to deliver them to Lord and to Cable, respectively, and to collect the premiums. With the two policies in his possession, McCabe, on the same day, called upon Cable and tendered him the Cable policy. Cable declined to accept it, saying that he did not have time to look into the matter at the moment, that he was very busy, and that he would be guided a good deal by what Lord said and did in the matter. (*Rec.*, 48.) After pressing him to accept, but unavailingly, McCabe finally carried away the policy, and went directly to the office of Lord, with whom he left the Lord policy for examination (together with a financial statement of the company), suggesting the sending of a check for the premium (*Rec.*, 48), and stating that he was going to leave town for a week or ten days. (*Rec.*, 102, 103.) McCabe then took the Cable policy back to Finney's office, leaving it there, and on the same day went to Cleveland.

* * *

On February 24, three days afterwards, Cable was taken ill while in Chicago, and towards evening Lord ac-

companied him to his home in Evanston. (*Rec.*, 106.) Upon reaching there a physician was called, who at once diagnosed the case as acute pneumonia (*Rec.*, 85), and the same evening a trained nurse was secured for Cable *by Lord* and brought by Lord to the Cable residence. (*Rec.*, 107.) This illness continued until March 2, a period of six days, when Cable died. During that period he was constantly under the care of trained nurses and of his family physician, and two other physicians were called in for consultation. (*Rec.*, 90.) The proofs of death filed by petitioner with respondent state unqualifiedly that Cable died of pneumonia (*Rec.*, 139), and the testimony of Doctors Clayton and Webster shows that he was in a serious and dangerous condition from the inception of his illness to the time of his death. (*Rec.*, 86, 89.) Lord was in daily communication with the Cable household, keeping himself fully informed of his friend's condition. (*Rec.*, 28, 107, 108, 113.) On Monday morning, February 27, before leaving home for his office, Lord made the usual inquiries about Cable (*Rec.* 108), and in the afternoon of the same day he procured delivery to himself of the Cable policy under the circumstances following.

***

McCabe returned to Chicago on Monday, February 27, and finding, at Finney's office, that no remittance of the premium upon the Lord policy had been received, he called upon Lord on the afternoon of that day for the purpose of collecting it. He stated his errand, and at the same time told Lord *that he had been out of town ever since the policy was delivered.* This dialogue then took place, according to McCabe (*Rec.*, 49):

LORD: "You were to give me a statement of the company."

MCCABE: "Why, I left it with the policy." (And so he did according to Lord's own testimony. *Rec.*, 102.) "I can get another one in five minutes over at the office."

LORD: "Well, all right. Have you got the Cable policy, too?"

MC CABE: "Yes, it is at the office."

LORD: "Well, bring that along, too, with a statement of the company, and I will pay you for both of them."

Lord's own story is that *he, himself, introduced the subject of the Cable policy by asking McCabe where it was;* and upon learning that it was at the office said:

> *"If you will go and get that policy and bring it to me I will pay for that policy and my policy—I will pay for Mr. Cable's policy and my own policy."* (*Rec.*, 103.)

It is undisputed that at this interview Lord was the one who first mentioned the Cable policy; that he made no reference of any kind to Cable's changed condition of health; and that McCabe, in entire ignorance of it, went back to Finney's office and got the Cable policy, which had been pigeon-holed there, and returned with it to Lord the same afternoon. McCabe handed it to Lord (or laid it in front of him upon his desk), saying as he did so or just afterwards: "Cable is all right, isn't he?" (*Rec.*, 50, 103.) Up to this point in the history of the transaction there was no conflict in the testimony, but conflict developed as to the precise language of Lord's reply to the foregoing question. McCabe testified that Lord replied: "The same as he has been for forty-eight hours," and that Lord then went on talking of other things, about the policy (*Rec.*, 50), and that Lord made the reply in such a low tone and in such a

casual manner that he, McCabe, paid no further attention to it, and in such a way that it conveyed to him the definite meaning that Cable was physically well and entitled to the policy according to its terms. (*Rec.*, 50, 51, 52.) McCabe further testified that he never had any information of any kind of Cable's illness. (*Rec.*, 56.) On the other hand, Lord testified on direct examination that his reply to the question asked by McCabe was: "No, Mr. Cable has been sick for two or three days, but is no worse than he has been for the last forty-eight hours." (*Rec.*, 103.) But on cross-examination he re-stated the reply, omitting the initial word "No" (*Rec.*, 106), and this was the form adopted by the master and the Circuit Court in the findings. Nothing further was said between Lord and McCabe on the subject of Cable's condition, and *the character of Lord's reply to McCabe's questions on the subject, is really the only controverted question of fact in the case from beginning to end.* (*Rec.*, 106.) Lord kept the Cable policy and paid McCabe in currency the premiums on both policies. (*Rec.*, 50.) McCabe states positively that neither at the time he delivered the policy to Lord, nor at any time before Cable's death, did he have any knowledge or any further information whatever of Cable's illness. (*Rec.*, 55, 56.) To impeach McCabe, generally, Miller testified that on or about March 3, 1899, McCabe narrated the "reply" to him (Miller), somewhat in accordance with Lord's version. (*Rec.*, 115.) And to impeach Lord, three witnesses, Maine, Bennett and Strong, testified that after Cable's death *Lord told them that on the morning of February 27, before he (Lord) had seen McCabe, he had learned that the policy had not been delivered to Cable, and had conferred with Cable's brother and one Moore respecting the advisability of obtaining de-*

livery, and that in this conference the three of them had agreed that Lord should get the policy from the insurance company if possible. (*Rec.*, 116-126.) Lord had previously denied making these declarations. (*Rec.*, 109-111.) Lord testified that during the week previous to Monday, February 27, he told Cable that he should probably accept his (the Lord) policy, whereupon Cable said: "You do with my policy whatever you do with your policy." (*Rec.*, 103.) This, the assumed agent's own statement, is the only evidence in the record of any authority on the part of Lord to take and pay for the Cable policy. Lord said that he used his own money to pay for the Cable policy (*Rec.*, 111), but kept no account of the disbursement upon his books, and made no claim for it against Cable's estate; and that it was finally refunded to him some time after Cable's death (he couldn't say when), by somebody (he couldn't say whom). (*Rec.*, 112, 113.)

On the evening of February 27 Lord took the policy to the Cable residence and handed it to some member of Cable's family (probably to Mrs. Cable, her mother, or to her sister or to Mr. Shaw, one of her counsel) (*Rec.*, 111), and after Cable's death it appeared in the possession of petitioner as administratrix. There is no evidence that Cable ever had knowledge of the delivery of the policy to Lord, or that he ever supposed that a contract of insurance with respondent existed in his favor. In the absence of evidence, we may well suppose that he would not have lent himself to such a transaction or scheme as that in which Lord engaged on February 27. It is perhaps significant that at the time of the death of Cable, *Lord was endorser on Cable's paper to the extent of* $45,000 *or* $50,000. (*Rec.*, 104.)

It has never been claimed that at the time of the delivery of the policy McCabe had any knowledge or information as to Cable's illness, except such as was afforded by Lord's controverted remark then made, or that any officer or agent of the insurance company had any such knowledge or information whatever prior to the death of Cable, unless, and only so far as, McCabe should be held to be an agent of the company.

* *
*

The material part of the body of the *policy* is as follows (*Rec.*, 9):

> "Number 94,082. Amount, $50,000.
>
> The United States Life Insurance Company in the City of New York, in *consideration of the application (hereby made part of this contract)* and of eight hundred forty-eight and fifty one-hundredths dollars paid on delivery hereof, and of a like sum payable on the 6th day of February in every year thereafter until ten years' premiums have been paid;
>
> Agrees, upon acceptance of satisfactory proofs of the death of Herman D. Cable (the insured) within the term of ten years ending on the 6th day of February, 1909, to pay *fifty thousand dollars in thirty consecutive annual installments of sixteen hundred sixty-six and sixty-six one-hundredths dollars each* to estate, or, if this policy be not assigned by the insured, to such other beneficiary as he may nominate to the company in writing, duly acknowledged; SUBJECT to the 'Benefits and Conditions' and 'Notice' on the succeeding pages hereof."

On the *back* of the policy under the title of "Benefits and Conditions" appears the following as Clause VIII:

> "When any installment hereunder is due the installments unpaid may be converted into their cash value, as shown in 'Table of Commuted Values' endorsed thereon."

Under the "Table of Commuted Values," referred to and endorsed on the policy (*Rec.*, 12), the commuted or cash value of the thirty unpaid installments under the policy in question is $30,000.

On the back of the policy under the title "Notice" it is provided:

> "Agents have no power to modify or change this contract, nor extend time for premium payment, nor waive forfeiture."

The *application* (*Rec.*, 11), signed by Cable, contains the following:

> "It is hereby declared and agreed, 1st, * * * that this application and declaration shall, with the policy herein applied for, and the benefits and condition, and notice contained therein, be the sole basis of the contract between me and the company, and shall be binding on all parties in interest under such policy; and that the policy to be issued hereon shall take effect *only upon* payment of the first premium and *delivery of the policy during* my lifetime, *sound health* and *insurable condition*. 2nd, that only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy or *any condition* thereof."

In the form of application the applicant was specifically asked, among other things: "Have you ever been subject to or had . . . *pneumonia?*" and his response was: "No." It is contended on behalf of the respondent that this was a continuing inquiry and a continuing response until a binding contract of insurance should be made, or until the actual delivery of the policy.

Neither the policy nor the application contains any limitation of the time within which suit must be brought upon the policy.

* *
*

Allegations were made in the amended and supplemental bill to support the resort to the Federal court in equity as follows (*Rec.*, 19):

"9. Your orator is informed and believes, and therefore states the fact to be, that on or about the 16th day of March, 1899, the defendant, Alice A. Cable, was by the Probate Court of Cook County, Illinois, appointed administratrix of the estate of said Herman D. Cable, deceased, and that said policy, numbered 94,082, on the life of said Herman D. Cable is now in the possession of said administratrix. Said administratrix has filed with your orator proofs of the death of said Herman D. Cable, and has requested payment to her of the commuted value of the unpaid installments of one thousand six hundred sixty-six and sixty-six hundredths (1,666.66) dollars each specified in said policy, being the lump sum of thirty thousand (30,000) dollars; but your orator is informed and believes, and therefore states, that the said administratrix has no authority, without the direction of said Probate Court, to elect to receive the commuted value of such installments, and that no direction respecting such an election has been given to said administratrix by said Probate Court. Subsequent to the making of said request for the payment of said commuted value and in the morning of the same day in which your orator filed its original bill in this cause, said administratrix, through one of her attorneys, made a demand upon your orator, at its place of business in said City of New York, for the payment to her of the first installment of insurance money expressed to be payable in said policy, but your orator declined to comply with said demand and to make such payment. Thereupon, later in the forenoon of the same day, and about an hour or an hour and a half before the filing of your orator's said original bill, said administratrix began in the Superior Court of Cook County an action at law against your orator for the commuted amount of said policy of insurance laying the *ad damnum* at fifty-five thousand (55,000) dollars, and caused a summons to be issued in said action, which

summons, your orator states as supplemental matter to said original bill, was served upon said Strong, the agent of your orator, on the 15th day of May, 1899. And your orator further states as supplemental matter to said original bill that a summons out of this court upon said original bill was served upon said administratrix upon the same day in which said original bill was filed, *to wit, on the 11th day* of May, 1899.

10. Your orator further avers that the constitution and laws of the United States of America confer upon your orator the right to remove into this court said action at law so begun against your orator; that, on the other hand, the State of Illinois by legislative enactment has sought to prevent the removal to this court by insurance companies of actions similar to said action so begun by said administratrix, and has practically destroyed such right, or made its exercise impracticable, by providing, in substance, that an insurance company shall forfeit and lose its right to do business in the State of Illinois upon removing any such action into this court; that by removing said action to this court your orator might lose its right to transact business in the State of Illinois, and would certainly become involved in serious controversy with said state respecting the transaction of any subsequent business by your orator in said state; that the laws of said state upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the facts in this case are somewhat different from the laws of the United States, as interpreted by the Federal courts, upon the same questions, and, from the standpoint of the laws of the United States, are unduly and erroneously adverse to insurance companies; that your orator is entitled to an application of the law according to the decisions of the Federal courts; and that under the facts and circumstances hereinbefore set forth in this bill your orator is without a due and proper remedy at law in respect to the claim of said administratrix under said policy of insurance, but is without any remedy at law whatever in this court.

11. Your orator further avers that if it is correct in

its understanding as to the lack of authority on the part of said administratrix to make an election for the payment of the commuted amount expressed to be payable by said policy, said administratrix has no right at the present time to sue for anything further than the first installment expressed to be payable in said policy, and may at any time bring an action at law against your orator for said first installment; that on account of the number of cases pending at law in the courts of the State of Illinois, in said Cook County, and the established practice requiring contested actions (with a certain exception not material here) to be tried in the order of their commencement, a contested action at law cannot ordinarily be reached for trial in said state courts for more than a year after its commencement, and frequently for a much longer time; that your orator is liable to have an action at law for said first installment brought against it in one of said state courts at any time by said administratrix; that if said administratrix should hereafter bring such an action at law for said first installment in one of said state courts, a year or more would elapse in the natural course of things before it could be brought to trial; that before the termination of any such action for said first installment, another installment would be claimed to be due under said policy, and your orator would be liable to an action therefor; that in the event of a judgment adverse to your orator in any such action for the first installment, and of an appeal by your orator from such judgment to the Supreme Court of Illinois, several years would probably elapse before a final determination of the rights and obligations of your orator could be had, and, in the meantime, pending such final determination, subsequent installments would be claimed to be due, and your orator would be subject to successive and repeated actions for such accruing installments; that in the meantime, pending such final determination, and even pending the trial of said existing action at law, in the Superior Court of Cook County, your orator is liable to be deprived of the loss of important testimony in its behalf through the possible death of said McCabe, inas-

much as there is no provision of law in the State of Illinois under which the deposition of said McCabe may be taken before trial; and that said McCabe is the only witness by whom your orator can prove certain of the material facts hereinbefore set forth.

. . . . .

13. The premises considered, your orator avers that said policy of insurance upon the life of said Herman D. Cable, deceased, is not a valid and existing contract or obligation against your orator; that the possession of said policy by said administratrix, and her claim set up thereunder, constitute a wrong and injury to your orator for which your orator has no plain and adequate and complete remedy at law, and particularly has no such remedy in this court; that your orator is entitled to have said policy of insurance cancelled and surrendered to your orator; and that this court should take jurisdiction in the matter, should restrain said administratrix from prosecuting her said pending action at law, and from bringing or prosecuting any other action at law on said policy, and should decree that said policy be cancelled and surrendered to your orator."

The answer to these allegations was as follows (*Rec.*, 29-31):

"Defendant further admits that she filed with the complainant proofs of death of the said Herman D. Cable, and requested payment to her of the commuted value of the unpaid installments of said policy, being the sum of $30,000 as specified in said policy, and that said complainant refused and declined to pay the same; that thereupon she instituted suit in the Superior Court of Cook County, Illinois, against the complainant in an action at law for the commuted value of said policy, to wit, the sum of $30,000, and that such action was commenced some time prior to the filing of the original bill of complaint herein.

. . . . .

Defendant further answering says that she admits that before the complainant became entitled to do business in the State of Illinois it was required by the laws

of the State of Illinois to file with the Auditor of Public Accounts its written agreement to not remove or make application to remove, into the United States Court any action or proceeding commenced in any of the state courts of said state upon any claim or cause of action arising out of any business transaction in fact done in said state and that such complainant did file such written statement and was granted a license by said state to do business therein upon the basis of said agreement; and it is further provided by the laws of the State of Illinois that should the complainant fail to keep its said agreement, then the authorities of said state have the right to and it is made their duty to revoke the license of the complainant to further do business in the State of Illinois; but this defendant denies that the laws of the State of Illinois, upon the question involved in this suit as interpreted by its highest legal tribunal, are different from the laws as interpreted by the Federal courts upon the same question, or that the laws of the state as enforced by the courts of the State of Illinois are erroneously adverse to insurance companies, but says that the same rule governing the rights of the parties to this suit is enforced both by the Federal and state tribunals, and that the complainant is entitled to set up as its defense in the suit brought against it by this defendant in the state courts the matters alleged in its said amended and supplemental bill, and that all of its rights will be as fairly protected in said state court as in the Federal court.

Defendant further answering denies that she has no authority as administratrix to make an election for the payment of the commuted amount expressed to be payable in said policy, but says that she has such authority, having made such election, and that there is no danger to the complainant that any other suit will be instituted by her for the various installments as provided for in said policy, and she denies that the complainant is liable to be deprived of the loss of important testimony by the possible death of said McCabe; and further denies that the complainant will be able

to prove by said McCabe that said complainant had no knowledge of the illness of said Cable at the time of the delivery of the policy by him and his reception of the premium thereon.

Defendant further answering says that said contract is a valid and existing one, and that she is in possession of said policy as administratrix aforesaid, and that the complainant has an adequate and complete remedy at law by setting up in the suit brought by her the alleged facts set out in the amended and supplemental bill herein, and says that the allegations in the amended and supplemental bill of complaint as to the manner of the procurement of said policy are false and untrue, and denies that the complainant is entitled to have said policy of insurance cancelled and surrendered, and further says that this court should not take jurisdiction of this matter, or restrain the defendant from prosecuting the said pending action at law."

Material portions of the Illinois statute mentioned in the bill (Hurd's Rev. Stat. of Illinois, Chap. 73, title, "Insurance," paragraphs 31-33), are as follows:

"§ 1. *Be it Enacted by the People of the State of Illinois, represented in the General Assembly:* It shall not be lawful for any insurance company, association or partnership, incorporated by, or organized under the laws of any other state of the United States, or of any foreign government for the purpose of insuring against loss or damage by fire, or against the risks of inland navigation or transportation, or for the purpose of life insurance, or for the purpose of insuring persons against accidents, to take risks or to transact any business whatever, authorized by its charter within this state, until it shall have complied with the following requirements, in addition to those already imposed by existing law: It shall first file with the auditor of public accounts a written application for a license to do business in this state, duly signed by its president and secretary, with its corporate seal attached, which statement shall contain the following declarations: that it desires to transact the business of

insurance in this state; that it will accept a license therefor according to the laws of this state, and that said license shall cease and terminate in case, and whenever it shall remove or make application to remove into any United States court, any action or proceeding commenced in any of the state courts, *of this* state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state; any permission, consent, agreement, condition or provision incorporated in any contract, mortgage, note, bond, obligation or policy of insurance authorizing or consenting to such removal, to the contrary notwithstanding.

"§ 2. Upon complying with the requirements of section one of this act, together with all other requirements now imposed by existing law, the auditor of public accounts shall issue to such incorporated company, association or partnership a license to transact its business in this state, and no such license shall be issued until all of said requirements shall have been complied with; and no such incorporated company, association or partnership shall carry on the business for which it may have been incorporated, within this state, until it shall have obtained such license: the fee for such license shall be the same as that provided for by existing law, to be paid by the incorporated company, association or partnership so securing such license.

"§ 3. If any such incorporated company, association or partnership shall remove, or make application to remove into any United States court any action or proceeding commenced in any state court of this state upon a claim or cause of action arising out of any business, or transaction in fact done in this state although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the Auditor of Public Accounts, at once to remove, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association

or partnership shall transact within this state any business for which it was incorporated until again duly licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a state court of this state to *any United States* court, no renewal of such license shall be made within three years after such revocation. Whenever any such license shall be revoked, the auditor of public accounts shall give notice of such revocation by mail, to the president and secretary of such corporation, and shall also cause a notice of the same to be published three times in some weekly public newspaper, published in the City of Springfield. A certified copy of the order of removal shall be sufficient evidence of the removal of any cause."

The Supreme Court of Illinois seems impliedly to have upheld the foregoing statute in *People ex rel.* v. *Pavey, Auditor,* 151 Ill., 101, in which a petition for a writ of *mandamus* to compel the State Auditor to revoke, as he had refused to do, the license of an insurance company for removing an action against it from a state to a Federal court, was sustained on demurrer, without any discussion, or apparently any question being raised as to the validity of the enactment.

Subsequent legislation (see appendix to this brief) has now transferred the powers and duties of the State Auditor under the above statute to a Superintendent of Insurance.

Illinois statutory provisions relating to the "Administration of Estates" and pertinent here are found in certain sections of Chapter 3, Hurd's Rev. Stat. of Illinois, which read as follows:

"SEC. 83. Upon suggestion made by an executor or administrator to the County Court, that any claim, debt or demand, whatever, belonging to the estate in his hands to be administered, and accruing in the lifetime of the decedent, is desperate on account of the

insolvency or doubtful solvency of the person or persons owing the same, or on account of the debtor having availed himself of the bankrupt law of the United States, or on account of some legal or equitable defense which such person or persons may allege against the same, or for the cause that the smallness of such claim, debt or demand, and the difficulty of finding the debtors, owing to the remoteness of their residence, or such executor's or administrator's ignorance of the same, the said court may order such claim, debt or demand to be compounded or sold, or to be filed in the said court for the benefit of such of the heirs, devisees or creditors of such decedent as will sue for and recover the same, giving the creditors the preference, if they or any of them apply for the same before the final settlement of such estate: *Provided,* that no order for the sale or compounding of any such debts, claims or demands, or any of them, shall be made until two weeks public notice shall have been given, to all whom it may concern, of the time and place when the said order will be applied for—which notice shall be given by the administrator or executor in a newspaper published in the county where such application is to be made, or if no such newspaper is published in such county, then by posting up such notices in not less than three public places in the county, of which one shall be at the office of the clerk of the County Court—which notice shall be so posted at least two weeks previous to the time of said application. The executor or administrator shall report to the said County Court for its approval, the terms upon which he has settled or disposed of any such claim, debt or demand.

Sec. 85. The County Court may order claims, debts, and demands, due at so remote a period as to prevent their collection within the time required within the final settlement of estates, and the collection or disposition of which is necessary to the payment of the debts against the estate, to be compounded or sold in the same manner and upon like conditions as though such claims, debts or demands were desperate or doubtful: *Provided,* that no such claim, debt or demand shall

be sold or compounded for less than ten per cent. below the value thereof."

The foregoing sections were enacted in 1872. By subsequent enactment in 1877 all probate jurisdiction in Cook County was transferred from the County Court to the Probate Court of Cook County, which now exercises it.

* *
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On page 2 of the brief of counsel for petitioner occur the following statements:

> "Finney was a life insurance broker, not regularly employed by any insurance company, but he had done business with the United States Life Insurance Company through its Chicago general agent for a number of years, and had procured insurance on the life of Cable in another company, which had lapsed in November, 1898. James F. McCabe was also an insurance agent or broker, and was requested, through Finney, to obtain applications for the United States Life Insurance Company. He, however, was not personally known to the Chicago general agent. Upon the delivery of the two policies to Finney, the gross amounts of the premiums were charged against him by the respondent's general agent, and he subsequently paid to such general agent the amount due on such premiums."

Because they bear upon the question—which, however, is not thought to be important, even if material—whether and how far any relation of agency existed on the part of McCabe and of Finney toward the complainant, the above statements seem to require notice. In no proper sense can it be said that Finney had been doing business *with the Insurance Company through* its Chicago agent. For a number of years his business had been purely that of a broker—had been merely bringing parties together. Finding certain persons willing to be insured, an insurance broker turns

over the insurance risks, for a consideration, to a regular agent of some company. That was his exact course in this case. Knowing that Cable and Lord would take insurance through him, he offered it to Strong without disclosing the names of the prospective applicants, made his arrangements with Strong for his own compensation, arranged with his employe McCabe to obtain the applications, and then turned over the entire matter to Strong, except that the policies, when written, were by Strong, handed to him for delivery and for collection of the first premiums, and he in turn handed them to McCabe for the same purpose. (*Rec.*, 69, 70, 79.)

Still less was there any direct relation on the part of McCabe toward the Insurance Company. The statement that he was "requested, *through* Finney," seems to imply that he was requested by the Insurance Company, or perhaps by Strong. This is not true. He was wholly in the employ of Finney, Strong had nothing whatever to do with him, and he had no business connection with the company or with Strong. (*Rec.*, 44, 74, 75, 82.)

The charging of the premiums against Finney, it should be explained, was merely the making of a memorandum against him upon a "tickler" and obviously for the purpose of preserving some kind of a record of the transaction. If complete delivery of either policy to the insured could be made by Finney, the agent would look to Finney for the premium. If delivery could not be made, Finney would return the policy and the charge would be cancelled by a proper credit. (*Rec.*, 75, 78.)

In this connection it is proper to notice a former contention of counsel for petitioner that, regarding Finney as *Cable's* agent, the charging by Strong against Finney of the

premium upon the Cable policy operated as a complete and final delivery of that policy, so that it took full effect upon February 21, three days before Cable became ill. This contention was made in the Circuit Court and in the Circuit Court of Appeals. It is now apparently abandoned, but it may possibly again make its appearance, and therefore the brief, simple and conclusive answer which can be made to it is here presented.

To meet any such contention it would perhaps be sufficient to refer the court to the answer to the bill, which not only fails to set up this supposed consummation of the insurance contract on February 21 as matter of defense, but on the contrary plainly takes the position that Cable had the right to reject the policy after that date; that there was to be no contract unless Cable accepted it, and that there was none in fact until Lord accepted it for him. But, irrespective of this, the question whether or not there was a consummated contract on the 21st of February depends, obviously, upon the intent or agreement of the parties. By the application the parties agreed that the policy should not take effect until delivery; and acceptance by Cable was essential to make a binding delivery.

Smith v. *Provident Savings Life Assurance Society*, 13 C. C. A., 284; 65 Fed., 765 (Sixth Circuit).

Equitable Life Assurance Society v. *McElroy*, 28 C. C. A., 365, 83 Fed., 631 Eighth Circuit).

Piedmont, etc., Life Assurance Co. v. *Ewing*, 92 U. S., 377.

Giddings v. *Ins. Co.*, 102 U. S., 108.

Markey v. *Mutual Benefit Life Ins. Co.*, 126 Mass., 158.

The application provided that the policy should not take effect until payment of the first premium, and that only the president, together with the secretary or the actuary, should have power to waive any condition of the policy, while the policy further provided that agents could not modify or change the contract, of which the application was made a part. There could be no delivery without payment, for Strong could not waive the effect of these limitations.

Davis v. *Mass. Mut. L. Ins. Co.*, 13 Blatch., 462; 7 Fed. Cas., 141, case 3,642.

Paine v. *Pacific Mut. L. Ins. Co.*, 2 C. C. A., 459; 51 Fed., 689 (Eighth Circuit).

United Firemen's Ins. Co. v. *Thomas*, 27 C. C. A., 42; 82 Fed., 406 (Seventh Circuit).

Kohen v. *Mut. Reserve Fund Life Ass'n*, 28 Fed., 705. (BREWER, J.)

Misselhorn v. *Mut. Reserve Fund Life Ass'n*, 30 Fed., 545. (BREWER, J.)

N. Y. Life Ins. Co. v. *Fletcher*, 117 U. S., 519, 530.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

And even if Strong had authority to waive payment, the charge for the premium made by him against Finney February 21 would not be evidence of such a waiver, for it was not absolute; it was a mere memorandum placed upon a "tickler," and was subject to cancellation upon return of the policy undelivered. (*Rec.*, 75, 78.)

But it further appears that when Finney, through McCabe, tendered the policy to Cable, the latter himself *declined to accept it*, and that he *afterwards* referred to Lord

the question of acceptance or rejection; and there was apparently an express understanding that Cable was not obliged to take the policy until acceptance after examination. (*Rec.*, 102.) These facts wholly destroy any reasonable basis for a contention that the manual tradition of the policy to Finney and the making of the "tickler" memorandum operated to put the insurance in force on February 21.

POINTS.

UPON THE JURISDICTIONAL QUESTION.

Respondent's contention is that the equitable jurisdiction of the Circuit Court of the United States was properly invoked and exercised, under the special circumstances of this case, because respondent did not have a plain, adequate, and complete remedy at law as such remedy is understood in the Federal courts.

I.

RESPONDENT DID NOT HAVE A PLAIN, ADEQUATE, AND COMPLETE REMEDY AT LAW IN THE FEDERAL COURT. IT COULD NOT ITSELF INSTITUTE ANY LEGAL PROCEEDING THERE, NOR COULD IT FREELY REMOVE TO THAT COURT ANY LEGAL PROCEEDING BROUGHT AGAINST IT IN THE STATE COURT. ITS CONSTITUTIONAL RIGHT TO HAVE, THROUGH REMOVAL, ANY CONTROVERSY AT LAW WITH PETITIONER ADJUDICATED IN A FEDERAL COURT HAD BEEN HAMPERED, EMBARRASSED, AND PRACTICALLY DESTROYED BY AN ILLINOIS STATUTE. THE REMEDY AT LAW WHICH IS A BAR TO EQUITABLE RELIEF IN A FEDERAL COURT MUST EXIST ON THE LAW SIDE OF THE SAME COURT.

Repeated decisions of this court and of other courts have defined what is meant by a "plain, adequate, and complete" remedy at law.

It is a remedy "equally effectual with the equitable remedy as to all the rights of the complainant" and "as practical and efficient to the ends of justice and its prompt administration."

Lewis v. *Cocks*, 23 Wall., 466, 470.

It is a remedy which, "both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

Kilbourn v. *Sunderland,* 130 U. S., 505, 514-5.

It is a remedy which may be resorted to without impediment.

Root v. *Railway Co.,* 105 U. S., 189, 216.

It is a remedy whose assertion is not liable to be "attended by the imposition of heavy penalties and forfeitures."

Pacific Express Co. v. *Seibert,* 44 Fed., 310, 315.

It is a remedy that is not "attended with a great and oppressive burden of risk," and whose adequacy does not "depend upon the will of the opposing party."

Bank of Kentucky v. *Stone,* 88 Fed., 383, 391 (*per* Judge TAFT, in the Circuit Court, with whom sat and concurred Mr. Justice HARLAN and Judge LURTON).

It is a remedy which is not doubtful or speculative.

Davis v. *Wakelee,* 156 U. S., 680, 688.

Whether such a remedy exists in any case must be determined by the particular circumstances of that case.

Watson v. *Sutherland,* 5 Wall., 74, 79.

Rich v. *Braxton,* 158 U. S., 375, 406.

To similar effect are

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

Sullivan v. *Portland, etc., R. R. Co.*, 94 U. S., 806, 811.

Drexel v. *Berney*, 122 U. S., 241, 252.

Gormley v. *Clark*, 134 U. S., 338, 349.

Allen v. *Hanks*, 136 U. S., 300, 311.

Tyler v. *Savage*, 143 U. S., 79, 95.

Walla Walla v., *Walla Walla Water Co.*, 172 U. S., 1, 12.

Smith v. *American Nat. Bank*, 32 C. C. A., 368, 376; 89 Fed., 832.

Pacific Express Co. v. *Seibert*, 44 Fed., 310, 315.

The Illinois statute against removals is doubtless repugnant to the Federal Constitution and void, along with the agreement not to remove required by it.

Barron v. *Burnside*, 121 U. S., 186.

Southern Pacific Co. v. *Denton*, 146 U. S., 202, 207.

Galveston, etc., Railway v. *Gonzales*, 151 U. S., 496, 502.

Barrow Steamship Co. v. *Kane*, 170 U. S., 100, 111.

Blake v. *McClung*, 172 U. S., 239, 255.

Chattanooga R. & C. R. Co. v. *Evans*, 14 C. C. A., 116, 120; 66 Fed., 809, 814.

Metropolitan L. Ins. Co. v. *M'Nall*, 81 Fed., 888.

Mut. L. Ins. Co. of N. Y. v. *Boyle*, 82 Fed., 705.

Commonwealth v. *E. Tenn. Coal Co.*, 30 S. W., 608 (Kentucky).

Commonwealth v. *Jellico Coal Min. Co.*, 30 S. W., 611 (Kentucky).

See, also,

Dayton Coal & Iron Co. v. *Barton*, 183 U. S., 24, 25.

Doubtless respondent might, upon learning of the action at law brought against it, have abandoned its bill and removed the action at law to the Federal court, but that course would have been fraught with danger, for a controversy with the State Superintendent of Insurance, and an attempted revocation of respondent's license, would have been certain to follow. As admitted by the answer of petitioner (*Rec.*, 30), whose counsel even now argue (page 17 of their brief) in favor of the validity and effectiveness of the statute, it would have been the duty of the state authorities under the statute to revoke respondent's license in case it attempted a removal of the action at law to the Federal court. The existence of the statute and the attitude of the state authorities with respect to it were a menace to respondent, made its right of removal valueless, and deprived it of its plain, adequate, and complete remedy at law.

Lewis v. *Cocks*, 23 Wall., 466, 470.

Root v. *Railway Co.*, 105 U. S., 189, 216.

Kilbourn v. *Sunderland*, 130 U. S., 505, 514-5.

Smith v. *Am. Nat. Bank*, 32 C. C. A., 368, 376; 89 Fed., 832.

Pacific Express Co. v. *Seibert*, 44 Fed., 310, 315.

Bank of Kentucky v. *Stone*, 88 Fed., 383, 391.

As respondent did not have the proper remedy at law in the Federal court, it is immaterial whether respondent had such a remedy in a state court. The equitable jurisdiction of the Federal courts does not depend, and cannot be made to depend, upon the adequacy of proceedings at law in the state courts.

Bean v. *Smith*, 2 Mason, 252; 2 Fed Cas., 1143, 1150, case 1174 (*per* Mr. Justice STORY).

Breeden v. *Lee*, 2 Hughes, 484; 4 Fed. Cas., 50, case 1828.

Mayer v. *Foulkrod*, 4 Wash. Circ. Ct., 349; 16 Fed. Cas., 1231; case 9341 (*per* Mr. Justice WASHINGTON, sitting with PETERS, J.).

Coler v. *Board of Commissioners*, 89 Fed., 257.

Niagara Fire Ins. Co. v. *Cornell*, 110 Fed., 816, 820.

Nat. Surety Co. v. *State Bank*,—— C. C. A., ——; 120 Fed., 593, 602.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 205-206.

Smyth v. *Ames*, 169 U. S., 466, 516.

See, also,

Stanton v. *Embry*, 46 Conn., 595.

Jurisdiction and procedure of the Federal courts cannot be made to depend upon, nor be controlled by, state legislation and state procedure; otherwise state legislation, by extending *legal* remedies, might destroy all equitable jurisdiction on the part of Federal courts. The jurisdiction and procedure in the Federal courts of law and of equity depend

upon essential principles and distinctions as understood and applied by the Federal courts themselves.

Bean v. *Smith*, 2 Mason, 252; 2 Fed. Cas., 1143, case 1174.

Mayer v. *Foulkrod*, 4 Wash. Circ. Ct., 349; 16 Fed. Cas., 1231, case 9341.

Robinson v. *Campbell*, 3 Wheat., 212, 222.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 205, 206.

Smyth v. *Ames*, 169 U. S., 466, 516.

II.

NOR IF THAT WERE MATERIAL DID RESPONDENT HAVE A PLAIN, ADEQUATE AND COMPLETE REMEDY IN THE STATE COURTS OF ILLINOIS, BECAUSE IT COULD NOT HAVE ITS CONTROVERSY WITH PETITIONER PROPERLY DECIDED THERE IN ACCORDANCE WITH CORRECT PRINCIPLES OF GENERAL INSURANCE LAW AS UNDERSTOOD AND APPLIED BY THIS COURT, AND BECAUSE IT MIGHT NOT HAVE BEEN ABLE TO INTERPOSE IN AN ACTION AT LAW THE DEFENSE THAT THE POLICY HAD BEEN PROCURED BY FRAUD. THIS SHOWS THE PECULIAR VALUE OF THE RIGHT TO BE IN THE FEDERAL COURT.

The substantial questions involved are questions of general law upon which the Federal courts exercise their own judgment, independently of state decisions.

Carpenter v. *The Providence Washington Ins. Co.*, 16 Peters, 495, 511.

Burgess v. *Seligman*, 107 U. S., 20, 33-34.

B. & O. R. R. Co. v. *Baugh*, 149 U. S., 368.

Gloucester Ins. Co. v. *Younger*, 2 Cur., 338; 10 Fed. Cas., 495, 500, case 5487, *per* Mr. Justice CURTIS.

Maier v. *Fidelity Mut. Life Ass'n.*, 24 C. C. A., 239; 78 Fed., 566, 572. (Opinion by Mr. Justice HARLAN.)

Washburn & Moen Mfg. Co. v. *Reliance Marine Ins. Co.*, 27 C. C. A., 134; 82 Fed., 296.

This court must consider its views of the principles of general insurance law to be sound, and any contrary views of other courts to be erroneous. It logically follows that if the views of the Supreme Court of Illinois, in applying such principles, differ from those of this court, any supposed remedy to respondent founded upon such different and erroneous views would not be an adequate remedy, but would in fact be no remedy at all. This court and the Supreme Court of Illinois appear to differ radically. One or the other must be wrong, and if the Illinois Supreme Court is wrong, then respondent could have had no remedy at all in the State court from the standpoint of this court.

See,

Bean v. *Smith*, 2 Mason, 252; 2 Fed. Cas. 1143, 1150, case 1174.

It is settled in this court that a mere solicitor or a local agent of a life insurance company cannot bind his company, affirmatively or by waiver, through his agreements or knowledge, when plain and appropriate limitations and restrictions upon his authority are brought to the attention of an applicant for insurance by being embodied in the application.

Davis v. *Mass. Mut. L. Ins. Co.*, 13 Blatch., 462; 7 Fed. Cas., 141, case 3,642.

Paine v. *Pacific Mut. L. Ins. Co.*, 2 C. C. A., 459; 51 Fed., 689.

United Firemen's Ins. Co. v. *Thomas*, 27 C. C. A., 42; 82 Fed., 406.

Kohen v. *Mut. Reserve Fund Life Ass'n*, 28 Fed., 705. (BREWER, J.)

Misselhorn v. *Mut. Reserve Fund Life Ass'n*, 30 Fed., 545. (BREWER, J.)

N. Y. Life Ins. Co. v. *Fletcher*, 117 U. S., 519, 530.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

The Supreme Court of Illinois holds that *any person* who receives applications for life insurance, collects premiums, and delivers policies is authorized to waive a limitation or restriction upon his own authority contained in a policy or in an application, and to waive other provisions of the contract, and to bind the company by agreement or waiver in connection with the act of manual delivery, without regard to the expressed limitations or restrictions; and that court has expressly indicated a disinclination to accept the rule enunciated in the *Fletcher* case, 117 U. S., and repeated in the *Grand View Bldg. Association* case, 183 U. S.

John Hancock Mutual Life Ins. Co. v. *Schlink*, 175 Ill., 284, 289-90.

Royal Neighbors of America v. *Boman*, 177 Ill., 27, 31.

Under a recent decision of the Supreme Court of Illinois question exists whether the defense of fraud in procuring an insurance policy, not affecting its manual execution, can be made available in an action at law, or can only be made available in a suit in equity to cancel the policy.

Robinson v. *Sharp*, 201 Ill., 86; 66 N. E., 299.

The remedy of respondent in a State court of Illinois is, therefore, very far from being "plain" and "adequate" at law.

III.

THERE HAD BEEN NO FINAL AND CONCLUSIVE ELECTION TO TAKE THE COMMUTED VALUE OF THE POLICY, AND THE POSSIBILITY OF A MULTIPLICITY OF SUITS, OR NUMBER OF SUCCESSIVE SUITS, AGAINST RESPONDENT FOR SEPARATE ANNUAL INSTALMENTS UNDER THE POLICY WAS ADDITIONAL GROUND FOR INVOKING THE JURISDICTION OF A COURT OF EQUITY.

Illinois Statutory Provisions concerning the "Administration of Estates," *supra.*

Washington v. *L. & N. Ry. Co.*, 136 Ill., 49, 56.

And

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

Buzard v. *Houston*, 119 U. S., 347, 352.

Bank of Kentucky v. *Stone*, 88 Fed., 383, 392.

Town of Springport v. *Teutonia Sav. Bank*, 75 N. Y., 397.

IV.

RESORT TO EQUITY WAS FURTHER SUSTAINABLE ON THE GROUND THAT RESPONDENT MIGHT LOSE IMPORTANT EVIDENCE, NAMELY, THE TESTIMONY OF THE WITNESS M'CABE, THROUGH LAPSE OF TIME.

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

Schmidt v. *West*, 104 Fed., 272.

Fuller v. *Percival*, 126 Mass., 381.

2 Story's Eq. Juris., § 700.

V.

UNDER THE CIRCUMSTANCES THE DISCRETIONARY JURISDICTION OF A COURT OF EQUITY TO CANCEL AN INSTRUMENT OBTAINED BY FRAUD WAS PROPERLY EXERCISED.

2 Joyce on Insurance, §§ 1674-80.

2 May on Ins., § 573.

2 Story's Eq. Juris., §§ 693, 700.

Pomeroy's Eq. Juris., § 912.

Bromley v. *Holland,* as reported in Coop., 9, 21.

The Prince of Wales, etc., Ass'n Co. v. *Palmer,* 25 Beav., 605.

British Equitable Assur. Co. v. *Great Western Ry. Co.,* 20 Law T., 422; s. c., 38 L. J. (1869), N. S., 132, 314.

Mutual Life Ins. Co. v. *Pearson,* 114 Fed., 395 (later than this Cable case).

Union Life Ins. Co. v. *Riggs,* 123 Fed., 312 (later than this Cable case).

See, also, the following cases cited in the brief for petitioner:

Insurance Co. v. *Bailey,* 13 Wall., 616.

Life Ins. Co. v. *Bangs,* 103 U. S., 780.

Home Ins. Co. v. *Stanchfield,* 1 Dill., 424; 2 Abb. U. S., 1; 12 Fed Cas., 449, case 6,660.

VI.

THE POWER OF THE FEDERAL COURT TO TAKE JURISDICTION OF THE CASE AND THE PROPRIETY OF ITS DOING SO WERE NOT AFFECTED BY THE COMMENCEMENT OF PETITIONER'S ACTION AT LAW IN THE STATE COURT, NOR BY THE PRAYER FOR AN INJUNCTION, WHICH WAS NOT TAKEN BY THE FINAL DECREE.

There was neither actual nor attempted injunction of state court *proceedings*. The original restraining order was sought against a *party*, and was properly issued; but the final decree contains no injunction at all, though the Federal court would have had power to order it.

French v. *Hay*, 22 Wall., 250.

Arrowsmith v. *Gleason*, 129 U. S., 86, 98-101.

Marshall v. *Holmes*, 141 U. S., 589, 599-600.

Nat. Surety Co. v. *State Bank*, — C. C. A., —; 120 Fed., 593.

Service of process was first had in the equity suit and gave the respondent the better right to proceed, if there were any question of priority involved. But there is no such question in the case, which shows two different suits, for different objects, proceeding, and capable of proceeding, concurrently in two different jurisdictions, the first judgment controlling if properly set up in the other proceeding.

Buck v. *Colbath*, 3 Wall., 334, 345-6.

Stanton v. *Embrey*, 93 U. S., 548, 553-4.

Ins. Co. v. *Brune's Assignee,* 96 U. S., 588, 592-3.

Gordon v. *Gilfoil,* 99 U. S., 168, 172, 178.

How widely it is understood in the Federal courts that concurrent suits may proceed in different jurisdictions, the following cases attest:

Gates v. *Bucki,* 4 C. C. A., 116; 53 Fed., 961, 965.

Short v. *Hepburn,* 21 C. C. A., 252; 75 Fed., 113.

Appleton Water Works v. *Central Trust Co.,* 35 C. C. A., 302, 305; 93 Fed., 286, 289.

Ogden City v. *Weaver,* 47 C. C. A., 485; 108 Fed., 564, 568.

Nat. Foundry & Pipe Works v. *Oconto City Water Supply Co.,* 51 C. C. A., 465; 113 Fed., 793, 800.

Martin v. *Baldwin,* 19 Fed., 340, 341.

Hurst v. *Everett,* 21 Fed., 218, 220.

Sharon v. *Hill,* 22 Fed., 28.

Lehman v. *Rosengarten,* 23 Fed., 642.

Hospes v. *O'Brien,* 24 Fed., 145, 146.

Ball v. *Tompkins,* 41 Fed., 486, 490.

Gilmour v. *Ewing,* 50 Fed., 656, 658.

First Nat. Bank v. *Duel Co.,* 74 Fed., 373, 374-5.

Bank of Kentucky v. *Stone,* 88 Fed., 383, 398.

The recent case of *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.,* cited on behalf of petitioner in the Circuit Court of Appeals, also in the brief supporting the petition for the issuance of the

writ of *certiorari* (p. 9), has no application. The universally accepted doctrine of that case refers only to proceedings *in rem,* or affecting the possession of property, while the state court proceeding in this instance was only an action at law.

Farmers' Loan & Trust Co. v. *Lake Street El. R. R. Co.,* 177 U. S., 51, 60-61.

UPON THE MERITS.

Respondent contends that this case was correctly decided upon the merits because:

VII.

LORD'S REPLY TO M'CABE AT THE TIME THE POLICY WAS ACTUALLY DELIVERED DID NOT CONSTITUTE A SUFFICIENT DISCLOSURE TO M'CABE, WHETHER THE TESTIMONY OF LORD OR OF M'CABE BE ACCEPTED AS TRUE. THERE WAS A CONCEALMENT OF MATERIAL FACTS AND THIS WAS IN ITSELF FRAUD VITIATING THE POLICY.

1 May on Ins., §§ 190, 209, 212.

1 Joyce on Ins., § 643.

2 Joyce on Ins., §§ 1844-49, 1855, 1869.

1 Story Eq. Jur., §§ 215 & 216.

M'Lanahan v. *Universal Ins. Co.,* 1 Pet., 170, 184-5.

Piedmont, etc., Life Ins. Co. v. *Ewing,* 92 U. S., 377.

Sun Mut. Ins. Co. v. *Ocean Ins. Co.,* 107 U. S., 485, 510.

Equitable Life Assurance Co. v. *McElroy,* 28 C. C. A., 365; 83 Fed., 631.

Manhattan Life Ins. Co. v. *Carder*, 27 C. C. A., 344; 82 Fed., 986.

Barnes v. *Fidelity Mut. Life Ins. Assn.*, 43 Atl., 341 (Penn.), (a pneumonia case).

Life Ins. Clearing Co. v. *Bullock*, 33 C. C. A., 365; 91 Fed., 487.

Ely v. *Hallett*, 2 Caines (N. Y.), 57.

And her defense being by way of confession and avoidance it was incumbent upon petitioner to show a full disclosure affirmatively.

Underhill on Evidence, § 250.

Elkin v. *Jansen*, 13 M. & W., 655.

Carroll v. *Malone*, 28 Ala., 521.

VIII.

NEITHER THE DISCLOSURE PRETENDED NOR ANY DISCLOSURE COULD HAVE AFFECTED THE COMPANY BECAUSE OF THE CIRCUMSTANCES SURROUNDING THE DELIVERY OF THE POLICY, THE CONDITIONS THEREIN, AND IN THE APPLICATION, AND THE LIMITATIONS UPON M'CABE'S AUTHORITY, OF ALL WHICH CABLE AND LORD WERE COGNIZANT OR ARE CONCLUSIVELY PRESUMED TO HAVE BEEN COGNIZANT.

Insurance Co. v. *Lyman*, 15 Wall., 664.

Insurance Co. v. *Wolff*, 95 U. S., 326.

Insurance Co. v. *Mowry*, 96 U. S., 544.

Thompson v. *Insurance Co.*, 104 U. S., 252, 259.

Insurance Co. v. *Fletcher*, 117 U. S., 519.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

Paine v. *Pacific Mut. Life Ins. Co.*, 2 C. C. A., 459; 51 Fed., 689.

Union Nat. Bank v. *German Ins. Co.*, 18 C. C. A., 203; 71 Fed., 473.

Maier v. *Fidelity Mut. Life Ass'n*, 24 C. C. A., 239; 78 Fed., 566.

United Firemen's Ins. Co. v. *Thomas*, 27 C. C. A., 42; 82 Fed., 406.

S. C., on rehearing, 34 C. C. A., 240; 92 Fed., 127.

U. S. Life Ins. Co. v. *Smith*, 34 C. C. A., 506; 92 Fed., 503.

Davis v. *Mass. Mut. Life Ins. Co.*, 13 Blatch., 462; 7 Fed. Cas., 141, case 3,642.

Lee v. *Guardian Life Ins. Co.*, 5 Ins. L. Jour., 26; 5 Bigelow Ins. Cas., 18; 15 Fed. Cas., 158, case 8,190.

Even if McCabe's testimony were wholly untrue and Lord had made a full disclosure to McCabe, and McCabe for his own purposes co-operated with Lord in the perpetration of a fraud upon the respondent, the petitioner could derive no benefit therefrom.

New York Life Ins. Co. v. *Fletcher*, 117 U. S., 519, 529.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

Maier v. *Fidelity Mut. Life Ass'n*, 24 C. C. A., 239; 78 Fed., 566.

U. S. Life Ins. Co. v. *Smith*, 34 C. C. A., 506; 92 Fed., 503.

National Life Ins. Co. v. *Minch*, 53 N. Y., 144.

Ryan v. *World Mutual Life Ins. Co.*, 41 Conn., 168, 172.

IX.

AS THERE WAS NO SUBSTANTIAL OR MATERIAL FACT IN CONTROVERSY, NOTHING COULD PROPERLY HAVE BEEN SUBMITTED TO A JURY IF AN ACTION AT LAW HAD BEEN INSTITUTED IN THE FEDERAL COURT. IT WOULD HAVE BEEN PROPER TO DIRECT A VERDICT FOR RESPONDENT UPON A TRIAL AT LAW.

Pleasants v. *Fant*, 22 Wall., 116.

Hendrick v. *Lindsay et al.*, 93 U. S., 143.

Oscanyan v. *Arms Co.*, 103 U. S., 261.

People's Savings Bank v. *Bates*, 120 U. S., 556.

X.

THERE HAVING BEEN NO ABUSE OR IMPROPER EXERCISE OF DISCRETION IN TAKING JURISDICTION, AND THE CASE HAVING BEEN CORRECTLY DECIDED UPON THE MERITS, THIS COURT, FOLLOWING ITS UNIFORM PRACTICE, SHOULD NOT DISTURB THE DECREE.

Allis v. *Ins. Co.*, 97 U. S., 144.

Lancaster v. *Collins*, 115 U. S., 222, 227.

Rice v. *Edwards*, 131 U. S., clxxv, clxxvii.

Mo. Pac. Ry. Co. v. *Fitzgerald*, 160 U. S., 556, 579-80.

ARGUMENT.

It is not proposed to submit full printed argument covering all the points presented by the record. Most of them need no argument at all, but the convenience of the court will no doubt be promoted by a discussion of some of them, and by further reference to certain of the cases above cited.

THE QUESTION OF JURISDICTION.

It goes without saying that if respondent had a plain, adequate, and complete remedy at law the resort to equity could not be sustained. The Judiciary Act would stand in that event as an insuperable obstacle, as, indeed, would the settled principles of equity jurisprudence without the statute. The statute merely affirms those principles, under which equity gives relief in this class of cases, in the discretion of the court, when it can see that there is no plain, adequate and complete remedy at law. The essential and fundamental question involved, is, therefore, whether the respondent had such a remedy at law for the fraud shown, and not whether the fraud of itself was sufficient basis for invoking equitable jurisdiction. There can be no difference between counsel on this proposition.

Insurance Company v. *Bailey*, 13 Wall., 616, and *Home Insurance Company* v. *Stanchfield*, 1 Dill., 424; 2 Abb. U. S., 1; 12 Fed. Cas., 449, case 6,660, seem to be the substantial reliance of counsel for petitioner in attacking the jurisdiction of the Circuit Court. Careful examination of those cases will disclose that they do not justify the confidence of counsel. On the contrary, they are believed to

have little or no application,—certainly no application adverse to respondent,—upon this record.

The case of *Aetna Life Ins. Co.* v. *Smith*, 73 Fed., 318, cited by counsel for petitioner, merely follows the *Bailey* case, and requires no attention here.

In the *Stanchfield* case, heard at circuit before Judge DILLON and Mr. Justice MILLER, action was brought upon a fire insurance policy after loss had occurred, and Judge DILLON, in delivering the opinion of the court, said that the question for determination was whether such a bill was maintainable "when the fraud alleged as a ground for the cancellation of the policy is available to the company as a defense to an action on the policy, and constitutes, if proved, a complete defense thereto." (12 Fed. Cas., p. 450.) It will be observed that the decision was thus predicated upon the assumption that the complainant had a plain, adequate and complete remedy at law. This is even more apparent from the following subsequent portions of the opinion, in which Mr. Justice MILLER concurred:

> "It is our opinion that the present bill sets forth no sufficient grounds for equitable interference, and we now proceed to state the reasons on which this opinion rests. No principle is more familiar than the one that where the law affords a full, complete, and adequate remedy, equity will not interfere. . . . In other words, the parties must litigate in the law courts unless there are good or legal reasons for invoking the aid of equity. This principle or rule must have full effect given to it in the courts of the Union, for it is recognized by the Constitution and by the Judiciary Act. . . . In the case before us no reason is set forth in the bill showing that the Insurance Company needs the aid of a court of equity to relieve itself of liability on the policy. . . . If the facts averred in the bill are true, they constitute a complete defense

to such an action, *and nothing is set forth showing that any obstacles stand in the way of making this defense at law.* . . . If no *hardship, no injustice,* will result and *no reason appears* for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice Story, that an application to equity to have 'instruments canceled or delivered up is not, strictly speaking, a matter of right, . . . but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case.' 2 *Story, Eq. Jur.,* § 693.

Chancellor Kent, in holding that a court of equity had full power to order instruments to be delivered up, whether void, or not, at law, and even if void on their face, after reviewing some of the leading English cases, says: 'But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps,' he adds, 'the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, *may be difficult or uncertain at law,* or *from some other special circumstances* peculiar to the case and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation.' *Hamilton* v. *Cummings,* 1 Johns. Ch., 517, 523, referred to by Marshall, C. J., in *Peirsoll* v. *Elliott,* 6 Pet., 95.

Applying these principles to the present case, we need not deny that equity has jurisdiction by reason of the fraud alleged, to entertain the suit, but are of the opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties at law seems a

more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because: (1) The company has a full, plain and perfect defense to the policy, at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper. (2) Action at law on the policy must (as we have seen) be brought in a short, limited time after the loss."

Of the *Bailey* case, the Circuit Court of Appeals said (See Appendix; also 39 C. C. A., 269; 98 Fed., 767):

"The case was heard in the Circuit Court upon the merits, and the bill dismissed, because it appeared that an action at law was then pending in the same court upon the law side, and that the remedy which the complainant could avail himself of there would be adequate; and the Supreme Court affirmed the decree. What the court held was that although equity had power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppressions of facts, yet it will not *generally* do so when these representations and suppressions can be *perfectly well* used as a defense at law in a suit upon the policy. Here the suit at law was pending in the same court. There was no invitation to the plaintiff to go into another jurisdiction to seek an adjudication of his rights. *The point was not raised nor adjudicated as to whether a remedy at law could be adequate and as effectual as the remedy in equity, where the complainant had not the remedy under his own control.* In the recent case of *Bank* v. *Stone* (C. C.), 88 Fed., 383, heard before Mr. Justice HARLAN, sitting with the two Circuit Judges, this question seems to have been adjudicated."

The opinion in the *Bailey* case, referring to an earlier decision, said (p. 621):

"Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party

seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must *in general* proceed at law, because the defendant, under such circumstances, has a right to a trial by jury.

. . . . .

The rule in the Federal courts is universal, that if the defendant has a good defense at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

. . . . .

Where a party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, *unless he is prepared to allege and prove some special circumstances* to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending *in the court whose decree is under re-examination.*"

In the *Stanchfield* case it appeared that under an express provision of the policy an action was required to be brought

upon it within twelve months after the occurrence of loss, and that about five months had already passed. In the *Bailey* case an action at law was already pending in the Federal court. In the present case under review there is no specified limitation of time within which an action must be begun upon the policy, and no action has ever been begun upon it in the Federal court.

The decisions of the English courts in respect to the jurisdiction of equity in suits of this general character are set forth in 2 Pomeroy's Equity Jurisprudence, Sec. 912, where it is said:

> "The doctrine is fully settled by an unbroken line of decisions extending to the present day, that with one remarkable exception (*i. e.*, fraudulent bills. See *Sec.* 913) the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate. The only question, therefore, presented to an English court, is, not whether the equitable jurisdiction *exists*, but whether it should be exercised. As the ablest judges have often said, one of the occasions for the existence of a separate court of chancery was its power to deal with all cases of fraud; its original grant of jurisdiction covered fraud in all its forms and phases. The law courts, on the other hand, originally had very little, if any, jurisdiction in such matters. In the early forms of action to enforce covenants, debts and other obligations, *ex contractu*, fraud was not admitted as a defense; and there was no form of action appropriate for the recovery of damages on account of fraud. The jurisdiction of

the law courts in such cases was of later origin, and was of gradual growth. It was not until the invention of the actions of assumpsit, case, and trover, in which equitable principles could be largely admitted, that the jurisdiction at law in matters of fraud became fully developed. The full jurisdiction of equity having thus been established from the earliest time, it should not, in accordance with familiar principles, be at all affected by a subsequent growth of a similar common law jurisdiction. To say that the full jurisdiction of equity has been any way abridged, impaired or altered, because the law courts have gradually assumed and finally acquired a like jurisdiction, even though competent in many cases to administer adequate relief, is to violate one of the most fundamental principles regulating the general equitable jurisdiction. The sum of the English doctrine, therefore, is that although the jurisdiction always *exists*, whether it will be exercised depends upon the circumstances of individual cases."

Reference may also be made on the general subject to

2 Story's Eq. Juris., §§ 693, 700.

2 Joyce on Insurance, §§ 1674-80.

2 May on Insurance, § 573.

That the remedy at law to defeat resort to equity must be *in the same jurisdiction* has been clearly enough decided by this court, and the question is apparently regarded as settled in the lower Federal courts.

In the leading case of *Smyth* v. *Ames*, 169 U. S., 466, it was held, the court speaking by Mr. Justice HARLAN (p. 516):

"One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he *cannot be deprived of that right by reason of his being allowed to sue at law in a state court* on the same cause of action."

In *Bean* v. *Smith*, 2 Mason, 252; 2 Fed. Cas., 1143, case 1,174, Mr. Justice STORY in the circuit court expressed a like view.

In *Mayer* v. *Foulkrod*, 4 Wash. Circ. Ct., 349; 16 Fed. Cas., 1231, case 9,341, a bill by a purchaser of distributive shares of an estate to compel payment by the executor, it was contended in support of a demurrer to the bill that the complainant had a plain, adequate and complete remedy at law under the statutes and in the courts of the State of Pennsylvania wherein the court sat. Upon this contention Mr. Justice WASHINGTON (with whom sat PETERS, J.), said (page 1234):

> "If the counsel for the defendant meant to argue that because the plaintiff might have maintained an action in the state court for the recovery of this legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. *This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy* ON THE OTHER SIDE OF THIS COURT. It is no argument to say that the plaintiff may have such a remedy (could it even be truly said) in the state court. The conclusive answer is that the plaintiff is under no obligation to resort to that jurisdiction."

Coler v. *Board of Commissioners*, 89 Fed., 257, was a bill by the holders of county bonds to prevent the county officials from applying certain funds to any purpose except payment of interest coupons upon the bonds, and the defendants denied the equitable jurisdiction of the court on the ground that complainants had a plain, adequate and complete remedy at law. On this point Circuit Judge SIMONTON said, p. 260:

> "Such a remedy might, perhaps, be found in the practice under the code [of North Carolina], but this

> will not affect the ancient and well-established jurisdiction of the court of equity. 'The adequacy or inadequacy of a remedy at law for the protection of one entitled on any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought.' *Smyth* v. *Ames*, 169 U. S., 516, 517. *The test is, has he a remedy at law in this court? If he has not, then a court of equity has jurisdiction.*"

Niagara Fire Insurance Co. v. *Cornell, State Auditor*, 110 Fed., 816, was a bill to enjoin the enforcement of statutes of the State of Nebraska alleged to be in violation of the Constitution of the United States. In the consideration of certain special proceedings prescribed by the statutes the court, McPherson, D. J., said (p. 820):

> "I suppose all the states have special proceedings for the hearing of grievances, and such proceedings are sustained if along the line, somewhere, and by some reasonable method, the party can have a hearing in the courts. And it is equally clear that such remedy is not to the exclusion of the power of a Federal court to act. There may be a plain, speedy and adequate remedy at law in the state courts, but with the proper parties, with the requisite citizenship, and the necessary amount involved, a Federal court sitting in chancery may take hold of the case, and order the proper decree."

In *National Surety Co.* v. *State Bank*, 120 Fed., 593 (not yet reported in Circuit Court of Appeals reports), was a bill founded upon a wrongful state court judgment for which there was a plain, adequate and complete remedy at law in the state court. The Circuit Court of Appeals for the Eighth Circuit sustained the equitable jurisdiction of the Federal court, and in delivering the opinion Sanborn, J., said (p. 602):

> "It is a general rule that the absence of an adequate remedy at law is a *sine qua non* of jurisdiction in equity,

and it is earnestly insisted by counsel for the appellees that the complainants in this suit were entitled to no relief in equity in the Circuit Court of the United States, because they had an adequate remedy at law in the state court which rendered this judgment, under these provisions of the Code of Nebraska. There are, however, many reasons why this contention cannot be sustained. The first, and one that is fatal to the position, is that it is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts, and the appellants have no such remedy. *The fact that they have a remedy at law in the state courts is not material. Smyth* v. *Ames,* 169 U. S., 466, 516, 18 Sup. Ct., 418, 42 L. Ed., 819; *Arrowsmith* v. *Gleason,* 129 U. S., 86, 98, 9 Sup. Ct., 237, 32 L. Ed., 630; *Mayer* v. *Foulkrod,* 4 Wash. (C. C.), 349, Fed. Cas., No. 9,341; *Bean* v. *Smith,* 2 Mason, 252, Fed. Cas., No. 1,174; *Coler* v. *Board* (C. C.), 89 Fed., 257; *U. S. Life Ins. Co.* v. *Cable,* 39 C. C. A., 264, 98 Fed., 761. When the controversy which this bill discloses arose between these citizens of different states, and was presented to the Circuit Court of the United States, that court had jurisdiction to hear and determine it, and the appellants had the legal right to the opinion and the judgment of that court upon the questions which it presented. This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like rights or remedies in the state courts, or by the fact that those courts had or had not concurrent jurisdiction. *Indeed, this right and this jurisdiction were provided by the Constitution, and granted by the acts of Congress, for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts which had concurrent jurisdiction to grant the relief and to administer the remedies which they were seeking in the national courts."*

In *Stanton* v. *Embry,* 46 Conn., 595, where the same doctrine was applied by the Supreme Court of Connecticut, a bill was filed to enjoin an action at law upon a judgment

rendered in the District of Columbia, on the ground that by mistake the judgment was rendered for a larger amount than was due, and the court said on page 601:

> "It is claimed by the counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial—a remedy which, it is claimed, is open to the petitioners under the laws of the District of Columbia—is an adequate, legal remedy, and that this court cannot assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered as adequate which a party is compelled to go into a *foreign jurisdiction* to avail himself of. *It must be a remedy which our own courts can apply.*"

Respondent could not begin an action at law in the Federal court. It had no legal remedy, therefore, except such as petitioner chose to give it. The adequate remedy at law depended entirely upon the volition of petitioner, and petitioner would not begin an action in the Federal court. Instead, she began an action in the state court. As petitioner is a citizen of the State of Illinois, and respondent is a citizen of the State of New York, respondent had a *right* under the laws of the United States to remove that action, and any similar action, to the Circuit Court of the United States for the Northern District of Illinois, without restrictions other than those involved in a compliance with the simple formalities of filing a petition and a bond as required by the laws of the United States. It thus had the right to have the question of its obligations under the insurance policy *tried and determined in the Federal court and tested by the rules of law there applied.* This right is given it by the constitution and statutes of the United States (in the language of Mr. Justice GRAY in *Barrow Steamship Co. v. Kane,* 170 U. S., 100, 111), "to secure a tribunal presumed to be more impartial than a court of the state in which

one of the litigants resides," and, as said by SANBORN, J., in *National Surety Co.* v. *State Bank, supra,* "for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts." The right would have been of peculiar value in this particular case, because, as will be more fully shown hereafter, the rules of decision applied by the Federal courts to important questions involved in the controversy differ from those obtaining in the state court, and differ to the advantage of the company.

Unforunately a statute of Illinois and the penalties prescribed by it and an enforced agreement made under it interfere with the free exercise of this right of removal. Had that right been exercised it would have seemed to be the duty of the State Superintendent of Insurance (who has succeeded to the functions of the Auditor in respect to licensing and supervising insurance companies), to revoke respondent's license and to exclude it from business in Illinois, conforming to the statute, which has been inferentially sustained by the highest court of the state. *People ex rel.* v. *Pavey, Auditor,* 151 Ill., 101. That duty is conceded by petitioner. This situation furnishes apt illustration and ample demonstration of the wisdom of the founders of this Republic and of subsequent national legislators in providing the right here infringed. The continuance of this regulation upon the statute books of Illinois is a distinct discredit to the state, and its spirit of unfriendliness to the Federal judicial system would be more in keeping with the declamatory utterances of a populist orator upon the hustings.

In *Doyle* v. *Continental Insurance Co.,* 94 U. S., 535, such a statute of the State of Wisconsin was upheld, with an opinion by Mr. Justice HUNT, which does not altogether

satisfy one's ideas of sound and logical reasoning, and with a strong dissenting opinion by Mr. Justice BRADLEY, with whom concurred Mr. Justice SWAYNE, and Mr. Justice MILLER. For convenient reference we quote most of the dissenting opinion here. It was as follows (94 U. S., 543):

> "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other. The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or state law precluding them from this right is absolutely void,—just as void as would be an agreement not to resort to the state courts for redress of wrongs, or defense of unjust actions; or as would be a city ordinance prohibiting an appeal to the state courts from municipal prosecutions.
>
> The questions arising upon these Wisconsin laws have already been considered by this court in the case of *Insurance Company* v. *Morse*, and we held and adjudged that the agreement which the company was compelled to make, not to remove a suit into the Federal courts, was absolutely void. In principle, this case does not differ a particle from that. The state legislation of 1872, under which and in obedience to which, the license of the appellees is threatened to be revoked, is just as unconstitutional and just as void as the agreement was in the former case.
>
> The argument used, that the greater always includes the less, and, therefore, if the state may ex-

clude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.

The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance, and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would not only cripple their energies, but would deprive the people of those states of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations—at least those of a commercial or financial character—should be able to transact business in different states. If these states can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the state and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

The decision of the majority of the court in the *Doyle* case does not now seem to be the doctrine of this court.

Barron v. *Burnside*, 121 U. S., 186, and subsequent cases, cited, *supra*, under the brief of points, seem to be irreconcilable with it and in effect to overrule it. Apparently the views expressed by the minority of the court in the *Doyle* case have since prevailed, and nowhere is there, perhaps, plainer indication of this than in the concluding observations made relative to a non-resident corporation in *Dayton Coal and Iron Co.* v. *Barton*, 183 U. S., 23, 25, to the effect that the court does not care "to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state."

But for the purposes of this case it does not seem to be important or material whether the state statute be valid or invalid. If it is valid its practical effect is manifestly worse than if it is invalid.

Upon the assumption, however, that the statute is invalid, what was the situation? If the company undertook to remove the state court action, the state auditor would have revoked the company's license, not by means of a judicial proceeding in which the company could resist the revocation on the ground of the invalidity of the statute, *but summarily, and by a stroke of the pen;* and the auditor would further have published the revocation in the newspapers of the state, as directed by the statute. Such act of revocation would have been unlawful, according to the assumption, but it would nevertheless have been performed, and performed before a bill for injunction could be filed to restrain it.

It needs no argument to show that the revocation of the license by the auditor, and its attempted exclusion from the state for at least three years, though unlawful, and the re-

quired publicity of it, would have imposed *irreparable injury* upon the company—an injury which could not adequately be redressed by means of an action for damages against the auditor. The publication throughout Illinois of the fact that the auditor had revoked the license of the company would have practically destroyed the company's business there, even though, as a matter of law, the revocation were void. The risk of sustaining an irreparable injury, which was attendant upon the remedy at law obtainable by the means of removal, was such as to destroy the effectiveness of that remedy.

Plainly the penalty imposed by the statute constituted an obstruction and a hardship which rendered respondent's remedy at law in the Federal court *incomplete and inadequate*. It was not "equally effectual with the equitable remedy as to *all the rights* of the complainant." It was not a remedy which could be 'resorted to *without impediment.*" It was subject to "the imposition of heavy penalties and forfeitures," and to "a great and oppressive burden of risk." This position is well supported by judicial decisions.

Pacific Express Co. v. *Seibert,* 44 Fed., 310, was a bill to restrain the collection of taxes and of penalties for their non-payment, imposed by an act of the state legislature, and for a decree declaring the act unconstitutional. Upon demurrer to the bill it was contended, among other things, that complainant had an adequate remedy at law by way of resisting, on the ground of unconstitutionality, the collection of the penalties imposed. Though the demurrer was sustained upon other grounds the court (CALDWELL, J.) upon this point said, on page 315:

> "While it is true that the plaintiff might test the validity of the act in any suit brought by the state to collect the penalty imposed for the non-payment of the

tax, that would not be an adequate remedy, for the reason that during the pendency of such a suit the penalty of $100 would be accruing each day, and the plaintiff *be denied the right to carry on its business in the state.* It would take months, and possibly years, to reach a final decision of the case, and, if that decision should be favorable to the state the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of $100 per day for the whole period, and the destruction of its business in the state, and probably great injury to its business in other states. *Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be, or may be, attended by the imposition of heavy penalties and forfeitures. And upon this ground,* and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case."

Bank of Kentucky v. *Stone*, 88 Fed., 383, was a bill by the bank to restrain the collection of taxes imposed by an act of the Kentucky legislature, upon the ground that the act was unconstitutional in that it impaired the obligaton of the contract contained in the bank's charter from the state. The case was heard upon demurrer to the bill by Mr. Justice HARLAN, sitting at circuit with Judges TAFT and LURTON. Respecting defendant's contention that complainant had an adequate remedy at law by resisting a suit for the taxes, the court said, per TAFT, J., on pages 390-1:

"It is well settled that in the Federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void, and independently of every other consideration. See *Rich* v. *Braxton*, 158 U. S., 375, 405; 15 Sup. Ct., 1006. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable

injury. (Citing cases.) What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may, under the duress of the threatened trespass, pay the taxes alleged to be illegal, and then sue the City of Louisville, the County of Franklin, and the City of Frankfort, to recover them back. (*Railroad Co.* v. *Commissioners,* 98 U. S., 541.) It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest, and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy, as there was in Tennessee in the case of *Shelton* v. *Platt.* The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint; they *may resort to a simple suit at law for them.* In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent., and to a fine of $50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay $50 a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment, and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer.

It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is, therefore, entirely inadequate. Smyth v. *Ames,* 169 U. S., 466, 518, 18 Sup. Ct., 418; *Express Co.* v. *Seibert,* 44 Fed., 315. It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer, by not distraining, may wholly deprive the taxpayer of this remedy. Indeed, the counsel for the City of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a *court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law* IF HIS ADVERSARY CHOOSES TO GIVE IT TO HIM. *The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.* To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justtice and its prompt administration as the remedy im equity.' *Boyce* v. *Grundy,* 3 Pet., 210, 215; *Sullivan* v. *Railroad Co.,* 94 U. S., 806, 811. And the application of the rule depends upon the circumstances of each case. *Watson* v. *Sutherland,* 5 Wall., 74, 79."

See also

Root v. *Railway Co.,* 105 U. S., 189, 216.

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The peculiar value to respondent of the right to have its controversy with petitioner adjudicated in the Federal court is apparent from facts already shown, but proper to be repeated here. The application for the policy signed by Herman D. Cable, deceased, and which became by its terms a part

of the proposed contract, provided "that the policy to be issued hereon shall take effect only upon payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition," and also, "that only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy or any condition thereof." (*Rec.*, 11.) The policy also provided that "agents have no power to modify or change this contract, nor extend time for premium payment, nor waive forfeiture." (*Rec.*, 12.) After the policy had been executed by respondent at its home office in New York and forwarded to Chicago, it was tendered to Mr. Cable, with the request for payment of the first premium, and he refused to receive it, stating, in substance, that he wished first to consult with his friend Lord, who had made like written application for a similar policy at the time Cable's application was made. Afterwards Cable became ill of acute pneumonia. Then Lord, with full knowledge of Cable's critical condition, and with full knowledge of the provisions of the policy above quoted, and with the full knowledge, which any intelligent man must be assumed to have, that respondent, if it knew of the illness, would not deliver the policy, procured McCabe, the insurance broker, through whom both applications were made (and made on the initiative of the applicants, or of the brokers, not on the initiative of the respondent), to get from respondent the Cable policy and deliver it to him (Lord), at the same time paying the premium with his own funds without the knowledge of Cable. Cable died three days afterwards, and respondent learned nothing of his illness until after his death, unless such knowledge would be imputable to it through Lord's brief observation to the broker, McCabe.

Now, under these circumstances respondent could *in the Federal court* defeat an action brought by petitioner, even

though McCabe, who made the manual delivery of the policy had known at the time of delivery all the facts of Cable's critical condition; for the delivery of the policy with such a knowledge on his part would not, in view of the contract provisions alluded to, operate as a waiver by respondent of the condition that the policy should not take effect except upon delivery during Cable's *sound health and insurable condition.* Under the *Federal court rule,* if McCabe knew of or participated in the fraud intended to be perpetrated upon respondent, the policy was nevertheless void.

Northern Assurance Co. v. *Grand View Bldg. Ass'n,* 183 U. S., 308.

N. Y. L. Ins. Co. v. *Fletcher,* 117 U. S., 519.

Maier v. *Fidelity Mut. Life Assn.,* 24 C. C. A., 239; 78 Fed., 566.

U. S. Life Ins. Co. v. *Smith,* 34 C. C. A., 506; 92 Fed., 503, 507.

On the other hand, *in the State court,* actual knowledge on the part of McCabe of Cable's illness at the time the policy was delivered, would probably, under the rule there obtaining, have been held to operate as a waiver by respondent of the contract condition avoiding the policy unless delivered during sound health, and the policy would consequently have been held to be *valid* and binding.

Hancock L. Ins. Co. v. *Schlink,* 175 Ill., 284.

Thus, if the Circuit Court had not taken jurisdiction of this suit respondent would, through the practical operation of the state statute in question, have been restricted to a remedy governed by a rule of law different from that obtaining in the Federal court, a rule regarded as erroneous in the Federal court, and as opposed to justice and right (*Northern Assurance Co.* v. *Grand View Bldg. Ass'n,* 183

U. S., 308),—just the kind of predicament from which the constitution and laws of the United States relating to the removal of causes were intended to relieve suitors. Thus, respondent would have been delivered over to the state court to be mulcted by means of a rule of law under which, perhaps, a mere messenger boy, from a public messenger office, delivering an insurance policy, may apparently waive and annul, by mere knowledge, the solemn provisions of a written contract for insurance.

Though respondent could not, in the nature of such matters, know positively, in advance, when this bill was filed, that petitioner would in the state court attempt to prove, or succeed in proving, knowledge on the part of McCabe concerning Cable's illness, thus makng ground for the invocation of the rule applied in the *Hancock* case, yet it was not only possible, but highly probable, that she would make the attempt; for, if the bill was true, no other course could possibly avail her. The possibility or probability of this was as forceful in favor of the position here contended for as if the bill had alleged in plain terms that petitioner intended to take that course upon the trial.

Still further justification for the respondent's resort to the Federal court in equity is furnished by a recent decision of the Supreme Court of Illinois in the case of *Robinson* v. *Sharp,* 201 Ill., 86, where it was held that "a court of equity may entertain a bill to investigate the alleged fraudulent conduct of an attorney in obtaining a contract from a client, and may set aside such contract if found to be unfair or obtained by undue advantage." In the determination of that case the court laid down a rule which seems fairly to give rise to doubt whether respondent could have introduced its defense of fraud at all in the action at law in the state court, or could hereafter do so if the present decree

were to be reversed and respondent were left to its remedy in the state court. In order that we may not be thought to present erroneously the position of the Supreme Court of Illinois, we quote all that is said on the point now under consideration in the opinion delivered in that case, beginning on page 88:

> "The alleged false representations which the appellees relied upon to defeat the written agreement which they had executed did not relate to the nature of the instrument signed by them, but to the nature and value of the consideration. Fraud touching the execution of an instrument, such as misreading, the fraudulent substitution of one paper for another, or obtaining by some trick or device an instrument which the party did not intend to execute, may be availed of in defense to an action on the instrument in a court at law. But if the party who has executed a written instrument, understanding at the time what he was signing, desires to avoid the legal effect of the writing on the ground he was induced to sign it by misrepresentations, false statements and deceit as to the nature, extent and value of the consideration, made by one who occupied a fiduciary relation to him, *he must resort to a court of equity for a decree reforming or setting aside the instrument.* This is the rule in all jurisdictions where the distinction between law and equity is retained. (*Papke* v. *Hammond Co.*, 192 Ill., 631.) An exception to the rule exists, by express statutory provisions, when it is desired to question the consideration of a negotiable instrument for the payment of money or property. (Starr & Cur. Stat. 1896, chap. 98, par. 13.) It is unnecessary to here inquire whether the exception did not also exist at the common law in cases of negotiable instruments, for the reason the instrument here under consideration is not a negotiable instrument. Courts of equity have long entertained bills brought to investigate alleged fraudulent conduct in transactions between client and counsel, and to declare such transactions void on the ground of constructive fraud if found to be unfair or obtained by

undue advantage (Citing cases). The chancellor did not err in retaining jurisdiction of the bill."

It will be observed that the foregoing decision makes no distinction between sealed and unsealed instruments, but relates to the kind of fraud which may or may not be offered as a defense to a contract at law. Its suggestion of a fiduciary relation underlying the contract involved seems to be without bearing in this Cable case, for, there is no greater relation of trust and confidence between an attorney and a client than between a life insurance company and an applicant for life insurance. Whether the rule stated would be allowed to stand as a general rule, even by the court which has enunciated it, may be open to doubt, but it is the last pronouncement of that court upon the subject, and under such a decision it would seem that it would be the duty of counsel for petitioner to object to the admissibility of the defense of fraud in an action at law against respondent in the state court. Such an objection would give rise to controversy, possibly to an appeal to the state Supreme Court, and would occasion delay and doubt. Under these circumstances the legal remedy in the state court could not be regarded as either adequate or plain, and respondent ought not to be compelled to "speculate" upon a chance of obtaining relief at law where equity can give relief.

Davis v. *Wakelee*, 156 U. S., 680, 688.

Respondent had made no agreement not to invoke the *equity* jurisdiction of the Federal courts in Illinois, but its invalid agreement not to remove an action at law has been strictly performed.

That the decision of the jurisdictional question in this Cable case has commended itself to the judgment of courts in

other circuits will be apparent from two later decisions to which this court is respectfully referred.

Mutual Life Ins. Co. v. *Pearson,* 114 Fed., 395.

Union Life Ins. Co. v. *Riggs,* 123 Fed., 312.

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Multiplicity of Suits and Loss of Testimony.

If the position of respondent thus far is sound, little need be said upon the two points of possible multiplicity of suits and possible loss of testimony, but they are both deserving of attention.

Under the Illinois statutory provisions above set forth concerning the administration of estates, the power of petitioner to make a final and conclusive election to take the commuted value under the policy, without authorization by the Probate Court of Cook County, is at least doubtful. This view is fortified by the case of *Washington* v. *Louisville and Nashville Ry. Co.,* 136 Ill., 49, 56, which is the only pertinent decision found.

By the policy, if binding, respondent would be obliged to pay $50,000 in thirty consecutive annual instalments of $1,666.66 each to the estate of the insured, subject to the provision that at the maturity of any instalment the unpaid instalments *may* be converted into their cash value according to a specific table, under which the commuted value of all the instalments is $30,000. An election by the beneficiary is here provided for. The pleadings show that petitioner has received no authority from the Probate Court of Cook County to make an election for the estate to receive the commuted value of the instalments, and an issue is directly

made by them whether she has any such authority without the direction of the Probate Court. The mere commencement of an action for the commuted value cannot constitute such an election, unless it is supported by the requisite authority.

When the bill was filed petitioner had made two different demands upon respondent,—one for the commuted value of all the installments, the other for the amount of the first installment only. (*Rec.*, 19.) There seems to be something of inconsistency between the two demands, and in that view respondent might naturally feel some uncertainty as to petitioner's course. Her action may be an attempted election to take the commuted value, but it is apparent that if the attempted election to take the commuted value is unauthorized, respondent could be subjected to a series of actions in different jurisdictions for installments periodically falling due. It would have been possible for petitioner by means of voluntary non-suits to speculate extensively as to the views of different courts, and, in consequence of appeals, to have a number of different actions running at the same time in courts of first instance. If her election did not bind the estate, the Probate Court could disregard it at any time, and in the posible event of her death it might well be that an administrator *de bonis non* would do so, deeming the full instalment value of the policy greater than its commuted value. It was plain that the cancellation of the policy in equity would effectually prevent this possible multiplicity of suits against respondent.

In the above cited case of *Washington* v. *L. & N. Ry. Co.*, 136 Ill., 49, discussing Sec. 83 of the ~~constitutional~~ *statutory* provisions under consideration, it is said (p. 56):

"The section of the statute referred to REQUIRES the

> administrator to secure an order of the Probate Court authorizing him to settle or COMPOUND claims due the estate."

The case of *Boyce's Executors* v. *Grundy*, 3 Peters, 210, was a bill to cancel a contract (obtained by fraud) which provided for the payment of $20,000 in annual instalments of $2,000 each. Judgment had been entered against complainant upon the first two instalments, and the fraud alleged in the bill had not been set up in these cases as a defense. Mr. Justice JOHNSON, delivering the opinion, said on page 215:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
>
> "In the case before us, although the defense of fraud might have been resorted to and ought to have been sustained in that particular suit, and, I will add, would have greatly aided the complainant in a bill to rescind, *yet it was obviously not an adequate remedy, because it was a partial one. The complainant would still have been left to renew the contest upon a series of suits, and that probably after the death of witnesses.*"

In *Buzard* v. *Houston*, 119 U. S., 347, Mr. Justice GRAY, delivering the opinion of the court, on page 352 referred to and approved the decision in *Boyce's Executors* v. *Grundy*, in the following language:

> "Accordingly a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind, or in degree, on the equity side than on the common law side; as, for instance, . . . where an agreement procured by fraud *is of a continuing nature*, and its rescission will prevent a multiplicity of suits, as in *Boyce* v. *Grundy*, 3 Peters, 210, 215, and in *Jones* v. *Bolles*, 9 Wall., 364, 369."

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The proof of fraud was shown by the bill to depend chiefly upon the witnesses, Lord and McCabe. The possibility of their death, or of their unavailability in the many suits which might be brought by petitioner, or her successor as administrator *de bonis non*, upon the various instalments, was an additional circumstance entitled to weight in the Circuit Court upon the question whether equity ought to interpose to relieve respondent in respect of the fraud alleged in the bill.

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

2 Story's Eq. Juris., Sec. 700.

Schmidt v. *West*, 104 Fed., 272.

Fuller v. *Percival*, 126 Mass., 381.

It should be remembered that the bill was *not* for an injunction only. The primary relief sought by it was the cancellation of the policy, and the injunction was sought as incidental to that relief. If, as argued for petitioner, the injunction could not properly be granted, this was no reason why the Circuit Court should not take jurisdiction to accomplish the cancellation.

But the issuance of the injunction prayed for would not violate Section 720 of the Revised Statutes prohibiting the granting of injunctions to stay *proceedings* in the courts of courts of a state. That section, and the cases cited by counsel for appellee on this point, have no application here; for, as alleged in the bill, the Federal Circuit Court first acquired jurisdiction *of the parties*. While summons was first issued in the state court action, process in this suit was first served, and the circuit court could have enjoined petitioner, *as a party*, from further prosecuting her action, or any action, at law in the state court.

Arrowsmith v. *Gleason*, 129 U. S., 86, 98-101.

Marshall v. *Holmes*, 141 U. S., 589, 599-600.

No injunction exists, and nothing has interfered with the jurisdiction of the state court over the action there pending, which could proceed concurrently.

Buck v. *Colbath*, 3 Wall., 334, 345-6.

Stanton v. *Embrey*, 93 U. S., 548, 553-4.

And other cases cited under the brief of points, *supra*.

II.

THE MERITS.

Upon the merits of the case, four judges have concurred,—or rather, it may be said, *six*, for five different judges sat in the Circuit Court of Appeals on the two appeals, and Judge Bunn, delivering the opinion of the court in the first appeal, said of the facts afterwards proved:

> "The fraud perpetrated is something quite appalling in the baldness and boldness of its outlines."

This unanimity of opinion on the part of so many judges below is sufficient in itself to create a strong presumption against the existence of any ground requiring this court to reverse the decree. And the decree will be found adundantly supported upon examination of the record. The answer of the petitioner to the amended and supplemental bill averred that the "true condition" of the insured "was fully told and made known" to the respondent prior to the delivery of the policy, and that the death of the insured was *not* occasioned by pneumonia. The decree, and the decision of the Circuit Court of Appeals sustaining it, both proceed

upon the ground that, in fact, there was *not* notification to the respondent of *the illness* of the applicant for insurance by the person who procured the delivery of the policy when the applicant lay upon his death-bed in the grasp of acute pnuemonia. The circuit court was unwilling to find the fraud *intentional,* but no such unwillingness actuated the Circuit Court of Appeals, which went further and said:

> (*Rec.,* 175.) "It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company and that his action must be treated as the action of the company—questions which we do not determine—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty."
>
> (*Rec.,* 177.) "It cannot here be doubted that if the insurance company or McCabe as its agent had been informed of the fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer."

Contracts of insurance are *fiduciary contracts.* They are *uberimae fidei.* The application is a *continuing offer* to become insured upon the conditions therein set forth, and the statements therein made are continuing representations until

consummation of the insurance. When the insurer delivers the policy and thus completes the contract, he does so subject to those conditions and representations, and in reliance upon their continued truth and upon the state of physical health as found by the medical examiner. If, before delivery, a representation of the application has become untrue, or a change occurs in the applicant's physical condition which materially affects the risk, it is his legal duty, and that of those representing him, to voluntarily disclose to the insurer the facts of the matter as fully, explicity and particularly as he himself knows them. The omission or failure to do this, *whether intentional or not,* constitutes a fraudulent concealment which vitiates the policy if delivered. These are elementary propositions, abundantly supported by the authorities cited under "point" VII, *supra.*

Counsel for petitioner in their brief, page 24, cite decisions holding that where answers to questions in an application are partial, unresponsive or inexplicit, it is the insurer's duty to make further inquiry, and if, failing to do so, it writes and delivers the policy based on that application, it cannot afterwards be heard to complain of the existence of facts which the answers, if complete and responsive, would have disclosed. Manifestly, these authorities do not apply to a case where the material fact affecting the risk comes into existence *after* the making of the application and *after* the medical examination which are to be the basis of the contract, and before the insurance is consummated. Where pending the closing of the contract some new fact arises, material to the risk, and known to the applicant, it is for the applicant to disclose it, and to disclose it without inquiry, and co-extensively with his own knowledge. Nothing less than this would be consistent with the highest degree of good faith, which is *then* the measure of his duty. Let us examine Lord's alleged disclosure in the light of these principles.

At the time of delivery McCabe said to Lord: "Cable is all right, isn't he?" According to the testimony of Lord, who was a witness on behalf of petitioner, his reply was: "Mr. Cable has been sick for two or three days, but is no worse than he has been for the last forty-eight hours." This was denied by McCabe, a witness on behalf of the company, who said that the sole reply was, "The same as he has been for forty-eight hours," given in such a tone and in such a manner as to convey the meaning that Cable was all right. McCabe was somewhat discredited, but not more than Lord; and Miller's testimony (*Rec.*, 115) that, after the death, McCabe, in telling the story of the transaction, stated the "reply" nearly in the language of Lord's version—though competent as affecting McCabe's credibility—was incompetent as evidence of what the "reply" was, because at that time McCabe's possible agency for respondent in delivering the policy, which at most was only a special agency, had ceased. Thus, the direct evidence upon the question whether Lord told McCabe that Cable had been sick, or as Miller says, "not very well," for two or three days, stood equally balanced. In this situation McCabe's story, and not Lord's should be taken as true, for two reasons:

First. Upon the question of disclosure the burden of proof was on the defendant. Her defense was by way of confession and avoidance. Confessing that when the policy was delivered Cable was not in sound health, and that sound health was a condition precedent to its validity, she set up, in avoidance, a waiver by the company of that condition; and it was for her affirmatively to establish the waiver by showing full disclosure of the illness before delivery. But irrespective of the contract conditions, proof of the naked fact that the policy was delivered while Cable had pneumonia made out a *prima facie* case of fraud, which put the defendant

upon justification, requiring her to show that the company was, at the time, fully informed of the illness (Underhill on Evidence, Sec. 250; Bigelow on Fraud, Vol. 1, p. 135; *Elkin* v. *Jansen*, 13 Meeson & Weslby, 655); and this, notwithstanding the negative averment of fraudulent concealment made in the bill. (*Carroll* v. *Malone*, 28 Ala., 521.)

Second. The circumstances surrounding the delivery corroborated McCabe and discredited Lord. Lord, an experienced business man, a wholesale druggist and a banker, who had frequently taken out insurance upon his own life (*Rec.*, 113), must have been familiar with the fundamental principles of life insurance, and must have known that the company would not wittingly, in consideration of $848.50 per annum (a rate based upon sound health) enter into a risk of $50,000 upon the life of a man then in the grasp of one of the most dangerous of all diseases, pneumonia. Yet, knowing this, he formed the purpose of procuring the policy, before the interview in which it was delivered. *Being aware that he could not carry out that purpose without concealing the illness, he must have intended concealment.* When he sent McCabe to the office for the policy, saying he would take and pay for it, he breathed no word of Cable's condition. If he had intended to disclose, he would have done so then. He would not have waited until the policy was in his hands, nor until questioned. It is evident that he would have said nothing at all but for McCabe's casual inquiry. Disclosure was inconsistent with his purpose. Upon the assumption of McCabe's honesty, disclosure would defeat the purpose. *Intending to conceal* the illness, is it likely that he, at the last moment, said anything to disclose it? Is it probable that he used language that might lead McCabe to withhold delivery? McCabe's version of the reply is perfectly

consistent with Lord's evident intent, and Lord's version is not. The admitted statement of Lord, that Cable "was no worse than he had been for forty-eight hours," made to a man who was entirely ignorant of the illness, was itself indicative of deceit; and the very fact that McCabe delivered the policy, is, in the light of the other circumstances, significant of non-disclosure to him. Under the evidence the circuit court should have found that Lord's reply to McCabe's question was in the language stated by McCabe. In that case it must be conceded that there was no disclosure at all, and conversely, and that there was a fraudulent concealment vitiating the policy.

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But let it be assumed for argument that the master and the circuit court were correct in finding that Lord's full reply to McCabe was, "Cable has been sick for two or three days but is no worse than he has been for forty-eight hours." This did not give such information as Lord, with knowledge of the pneumonia, was in duty bound to give. It was not a disclosure commensurate with the highest degree of good faith. It did not reveal the fact that since the application *a change had occurred* in Cable's physical condition which *materially affected the risk*. It was not as explicit and particular as Lord's own knowledge. In the application *Cable had represented that he had never had pneumonia,* and Lord's reply did not disclose in the slightest degree that such representation (a continuing one) had become untrue. The material and important thing was the *degree* of the illness, the serious character of it, the fact that it was of such nature as to deprive Cable of "sound health" as understood in the law of insurance; and Lord's reply afforded no information on that point. It was of no con-

sequence to the company that Cable had been sick for two or three days, unless he was *seriously* sick. If the sickness had consisted of a cold, a headache, a toothache, or some other slight ailment, Cable would have been entitled to the policy, because such a disorder would not materially affect the risk. Lord's reply was entirely consistent with Cable's then being in sound health, and it was, therefore, not a disclosure of unsound health. The failure to be explicit was as much a concealment and a fraud as if Lord had spoken nothing. *Ely* v. *Hallett*, 2 Caines (N. Y.), 57; *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S., 485, 510. "The statement was one of those half-truths that was far more dangerous and misleading than a downright falsehood, and it perfectly accomplished its purpose of deceit. (*Equitable Life Assur. Co.* v. *McElroy*, 83 Fed., 635.) Counsel for petitioner do not apparently contend that the reply disclosed Cable's unsound condition of health, but they assert a doctrine that it was sufficient to put the company upon inquiry, and that it constituted constructive notice of all facts which such inquiry would have developed. It has been already noted that one upon whom the law imposes the highest degree of good faith cannot shelter himself under such a doctrine. It has no place in transactions between fiduciaries. Lord's position was analogous to that of a trustee asserting acquiescence against his *cestui que trust* based upon information imparted by him; and in such case it is fundamental that there can be no acquiescence unless the information given was as full, particular and complete as the trustee himself had. As said by Lord ELDON, *Walker* v. *Symonds*, 3 Swanston, 1, 73, respecting the duty of a trustee to disclose to the *cestui que trust:*

> "He who, undertaking to give information, gives but half information, in the doctrine of this court conceals."

Not only did the reply fail to disclose the material fact, but the failure was manifestly intentional. Lord's entire attitude, his introducing the subject of the Cable policy of his own accord, his sending McCabe to get it without mentioning the illness, his silence until questioned and until the policy was practically in his possession, and the manner and language of the reply itself, are, in the light of subsequent developments, strongly persuasive evidence of an attempt to conceal and to deceive; and the fact that he was endorser on Cable's paper to the extent of $45,000 or $50,000 may have supplied a motive for his conduct. The opinion of the district judge that the reply was made in the "hurry of business" and that the concealment was unintentional has no support in the evidence. Lord himself, in his testimony, did not attempt to thus excuse or palliate his conduct; *he* considered it perfectly proper. (*Rec.*, 113.) But whether or not he had a conscious intent to conceal, this is a case for the application of the rule that a man must be held to have intended the necessary and inevitable consequences of his own acts.

It is submitted that delivery of the policy by McCabe with no more knowledge of Cable's illness than that given to McCabe by Lord's own version of the reply, afforded no ground for a reasonable claim that respondent was estopped from asserting fraud and had waived the contract condition respecting delivery during sound health.

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But let it be further assumed for argument that Lord's reply to McCabe was a full disclosure to a local and special agent of the company of such facts respecting Cable's illness as it was Lord's legal duty, acting on behalf of Cable, to disclose. Upon this assumption it is contended that such dis-

closure affected respondent, and that the coincident delivery of the policy operated as a waiver by respondent of the written condition contained in the application, that the policy should take effect only upon delivery during Cable's *sound health and insurable condition.* This is denied. In the first place, the doctrine of waiver is but an application of the principle of estoppel, and it involves the proposition that a party claiming the benefit of it must in some way have been induced to change position for the worse through an act of the other party, so that it would be inequitable to permit the other party to repudiate the act. In this case the payment of the premium by Lord under the circumstances shown can hardly be said to have wrought a change of position for the worse on Cable's part in reliance upon McCabe's action. In the second place the contention as to waiver is untenable because of the limitations upon McCabe's authority, which were known to both Cable and Lord. This is hardly an open question in this court, as already pointed out in discussing the question of jurisdiction. These limitations are contained in the written application, and in the policy itself, both of which Cable, as well as Lord acting for him, is conclusively presumed to have read. Lord's own policy, which had been lying on his desk for a week, contained similar limitations. The application provided as follows:

> "It is hereby declared and agreed . . . that this *application* and declaration shall, *with the policy* herein applied for and the benefits and conditions *and notice* contained therein, *be the sole basis of the contract* between me and the company, and shall be binding on all parties in interest under such policy; and that the policy to be issued hereon shall take effect only upon payment of the first premium and *delivery* of the policy during my lifetime, *sound health and insurable condition:* 2d. That *only the president, together with the secretary or*

the actuary shall have the power to alter or waive the policy or any condition thereof."

The *policy* set forth that the insurance company, *"in consideration of the application (hereby made part of this contract)"* and of the payment of the stated premiums when due, agreed to pay the insurance of $50,000 "subject to the 'BENEFITS AND CONDITIONS' and 'NOTICE' on the succeeding pages hereof;" and under the title "NOTICE" thus referred to, was the provision that *"agents have no power to modify or change this contract nor extend time for premium payment nor waive forfeiture."*

Considering McCabe as an agent of respondent, these limitations upon his authority, which were a part of the proposal for the insurance and of the proposed contract, rendered Lord's disclosure to him ineffectual as a disclosure to respondent, and his coincident delivery ineffectual as a waiver by respondent. McCabe could not, by any act or parol agreement, overthrow the express written terms of the contract as made and delivered. The case here is certainly not as strong as if McCabe had expressly stated to Lord that he would and did waive on behalf of the company the effect of the illness, but even in that supposed case the policy would not be binding according to the decisions of this court and to the settled course of judicial authority in the Federal courts generally, as shown by the citations under "point" VIII, *supra*, especially *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S., 519, 529; *Northern Assurance Co.* v. *Grand View Bldg. Ass'n*, 183 U. S., 308, 361; and *Maier* v. *Fidelity Mut. Life Ass'n*, 24 C. C. A., 240, opinion by Mr. Justice HARLAN, showing, among other things, what was decided in *Ins. Co.* v. *Chamberlain*, 132 U. S., 304, in which the opinion was written by him, and which was at one stage of this case considerably relied upon by petitioner's counsel.

Even supposing for argument that McCabe had apparent authority to waive any and all contract conditions, and that Lord fully disclosed to him, the policy is nevertheless invalid for fraud. Decisions above cited establish that the rule which charges a principal with the knowledge of his agent is for the protection of *innocent* third persons. If a person colludes with an agent to cheat and defraud the principal, the latter is not responsible for the act or knowledge of the agent. In the case supposed Lord's knowledge that the disclosure to McCabe did not reach respondent, and that McCabe was committing a fraud upon respondent by delivering the policy would prevent any just claim of innocent reliance in good faith upon McCabe's action; and it would be held that Lord participated in McCabe's fraud, conspiring with him to wrong the company. In such circumstances, neither Lord nor his principal, nor any beneficiary under the policy, could set up estoppel against the company based upon any act of McCabe, the co-conspirator.

Counsel for petitioner, on page 16 of their brief, state the proposition that contracts entered into by a foreign insurance company within a state "are controlled by the statutes of the state," and they cite *New York Life Ins. Co.* v. *Cravens*, 178 U. S., 398, in support of that proposition. The *Cravens* case dealt with the question whether a certain policy of life insurance made by a New York company in the State of Missouri with a citizen of Missouri was subject to a Missouri statute regulating the nature and terms of life insurance policies and making such policies non-forfeitable under certain circumstances. It was held that the Missouri statute applied. There is no occasion for respondent to concern itself with the decision of that case, for there is no Illinois statute governing the interpretation or effect of the policy

in this case, nor are there any Illinois insurance statutes whatever involved, except the one which is about to be discussed and which is not conceived to have any application. The principles of general insurance law, which the Federal courts determine for themselves independently of state decisions, govern this case.

But it seems to be argued by counsel for petitioner under their proposition that even if the delivery by McCabe with imputed or actual knowledge of Cable's real condition, would not, under the general principles of insurance law, as enunciated by this court, operate as a waiver, such supposed knowledge should so operate by virtue of the Illinois statute declaring in substantial effect that under certain specified circumstances persons shall be considered agents for life insurance companies. We fail to see how this statute helps petitioner's case, because, *first,* rightly understood, it does not govern even the *relation* between the respondent and McCabe, and, *second,* whatever its effect upon McCabe's *relation,* it does not prescribe the *extent of his authority* nor affect or nullify the plain limitation upon that authority, of which limitation Cable and Lord had knowledge.

Counsel for petitioner evidently share the impression, which is quite widely current, and to which the supreme court of Illinois has by some expressions, apparently not well considered, given countenance, that by force of certain Illinois statutory provisions (printed in an appendix hereto), *all* persons who solicit the placing of insurance, either fire or life, are made agents under our state statutes, *as between such persons and the companies* in which insurance may have been effected partially through their instrumentality. This is believed to be an erroneous impression, as is well shown by the case of *United Firemen's Insurance*

Co. v. *Thomas* (on rehearing), 34 C. C. A., 240, 243; 92 Fed., 127, 130, decided by the Circuit Court of Appeals for the Seventh Circuit. That case related to certain provisions in a section of another statute concerning fire, marine and inland navigation insurance companies, organized outside of the United States, but it is quite as instructive in respect to the corresponding provisions contained in Sections 22 and 23 of the life insurance statute (*Appendix*, XXVI, XXVII. The provisions passed upon in the *Thomas* case, relating to insurance by *foreign* companies (*Appendix* XXIII, XXIV), are duplicated in substantially identical language in the general fire insurance statute relating to insurance by companies, organized in the United States but outside of Illinois (*Sec.*, 22; *Appendix* XVIII). Both the general fire insurance and the life insurance statutes, as in force when this case arose, were passed in the month of March, 1869, and practically established insurance codes for the state. The provision of the fire insurance act contained in the long Section 22 (Hurd's Stat., Ch. 73, Par. 68; *Appendix* XV), are quite largely duplicated by the provisions of the life insurance act in the short sections, 3, 7, 15, 21, 22, 23 and 24 (*Id.*, Pars. 183, 187, 195, 201, 202, 203, 204; *Appendix*, XXV). Upon a careful examination of these various sections, it will be seen that Section 23 of the life insurance act is certainly no stronger, and it seems even weaker, than the corresponding provisions of the fire insurance act, identical in terms with the provisions of the foreign insurance companies' act discussed in the *Thomas* case, for the life insurance section clearly refers only to persons acting in connection with companies neither incorporated in Illinois *nor lawfully established in business* in Illinois. Respondent is not *such* a company. It has admittedly been

for many years established in Illinois under proper license. The statute prescribes the terms on which life insurance companies of other states, and their agents, may do business in Illinois, forbids persons to transact any life insurance business for companies which are not qualified to do business in the state in conformity with its laws, and it then contains this section, which is relied upon by counsel, but is obviously directed exclusively *against persons* assuming to act in behalf of "underground" or "wild-cat" companies:

> "Whoever solicits insurance on behalf of any life company not chartered by *and not established within* this state, or transmits, for any person other than himself, an application for life insurance, or a policy of life insurance, to or from *such company*, or advertises that he will receive or transmit the same, shall be held to be an agent of *such company* to all intents and purposes, and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this state relating to life insurance companies not incorporated by the legislature thereof."

Language can hardly be imagined to make the foregoing provision more clear, and it is difficult to see how anyone reading the section with any care can interpret it as intending anything more than to bring persons acting in connection with such "underground" and "wild-cat" companies under the same statutory regulations and penalties applicable to agents of foreign life insurance companies lawfully established in Illinois. This is the only section upon which the supposed statutory agency of a solicitor or broker is predicated.

Two Illinois cases have been cited as showing a different construction of the statute by the Illinois supreme court, viz.: *Insurance Co.* v. *Ruckman*, 127 Ill., 364, and *John Hancock Mutual Life Ins. Co.* v. *Schlink*, 175 Ill., 284. The Circuit Court of Appeals for the Seventh Circuit,

in the rehearing of the *Thomas* case, had no difficulty in disposing of the *Ruckman* case in terms that are equally applicable to the *Schlink* case, which we think can be as easily disposed of here. The *Thomas* case was decided (on the rehearing) in February, 1899, and the *Schlink* case in October, 1898, so that apparently neither decision affected the other.

In the *Schlink* case a brief reference is made to the *Ruckman* case as an authority on the construction of the statute, but under the *Thomas* case that reference must be regarded an unreliable and unsound one. The reference was wholly unnecessary, for the person whose relations were under consideration was an apparent *"general agent"* of the company (p. 287), which accepted his acts, and the writer of the opinion says he "made contracts" (p. 290). It was, therefore, wholly unnecessary to bring in the *statute* to show that such a person was the agent of the insurance company, instead of being the agent of the insured. The *Schlink* case gives no more authoritative construction to the statute than the *Ruckman* case did. It merely professed to follow the *Ruckman* case in the same way as the *Ruckman* case, erroneously professed to follow the prior case of *People* v. *People's Insurance Exchange*, 126 Ill., 466.

But, in reference to these two cases, we do not need to go even as far as the court went in the *Thomas* case, sound though that view is believed to be. It is sufficient to point out that neither case attempted to pass upon anything beyond the question of bare *relation*—the question whether the particular person discussed should be regarded as the agent of the insured or of the insurer. In neither case is anything decided, or even said, respecting the bearing of the statutory provision upon the apparent *authority* of agents,

or upon limitations of "their apparent authority." So far as there is any implication at all it may be said to be distinctly in favor of the view that no prohibition upon limiting an agent's powers is contained in the statute, for the opinion in the *Ruckman* case refers approvingly to a Wisconsin decision holding that the stronger statute of that state has changed the ordinary rule of law "that the insured must at his peril know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority." (127 Ill., p. 377.)

The Wisconsin statute is likewise quoted and considered in the *Thomas* case (34 C. C. A., 246, 247; 92 Fed., 132, 133), and it will be seen that it applies in terms to persons acting either on behalf of *any* insurance corporation, or on behalf of *any applicant* for insurance. No case has been found holding that either statute prohibits limitations of an agent's authority or destroys the effect of such limitations of authority as are distinctly and affirmatively called to the attention of an applicant. The utmost that could possibly be claimed for the Illinois statute would be what was in substance said of the Wisconsin statute by the supreme court of Wisconsin namely, that it takes away from an applicant for insurance the burden,—ordinarily resting upon every person dealing with an agent (1 Joyce on Ins. Sec. 430),—of ascertaining at his peril the extent of the agent's authority, and casts upon the insurer the burden of affirmatively notifying an applicant of the limitations upon the agent's authority, if the insurer desires the benefit of such limitations. Just such notification was given in this case.

To say, then, that McCabe was an "agent" of respondent under the Illinois statute or otherwise, does not dispose of the question as to his real or apparent authority to waive contract conditions.

Right here it may be said that although McCabe and Finney solicited and procured as independent brokers the application from Cable and *tendered the insurance* to the general agent of respondent, it probably must be considered that Finney, at least, became subsequently a special agent of respondent *for the single and limited purpose* of delivering the policy to Cable and of collecting the first premium. But neither the respondent nor its general agent at Chicago knew anything about McCabe (*Rec.*, 77), when the policies were given Finney for delivery, and it is quite a different question whether McCabe ever came in any way into *any* agency relation with respondent. The Circuit Court of Appeals expressly reserved that question (*Rec.*, 175), and it is not believed material to a decision of this case. In any event, the authority of McCabe as a possible or supposed agent was no greater than would have been possessed by an ordinary messenger boy employed for the same purpose.

The *Schlink* case has apparently been thought by counsel for petitioner to control this case. The facts in that case were in some respects much like those here, but no issue was made there about the illness of the insured. The reason seems plain. *There was a technical delivery and an acceptance of the policy before the illness,* although there was no manual tradition nor payment of the premium (p. 288.) The insured *accepted* the policy, and told the "general agent" who "made contracts" for the company to come and get the promised premium. The real question considered was whether that agent could waive payment of the premium in cash, and it was held that as a "general agent" he could do so, notwithstanding a limitation contained, not in the *application,* but in the *policy.* The *Schlink* case may be

dismissed with the remark that it is in conflict with the views of this court, and is no authority here.

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The facts disclosed by the record are almost undisputed. The propositions of law applicable to them are clear. It seems plain that if the case had been tried at law before a jury in the Federal court no verdict adverse to respondent would have been allowed to stand. Under such circumstances the submission of the case to a jury would have been an idle form. Even upon Lord's own statement at the conclusion of the evidence it would have been the duty of the court to direct a verdict for respondent. No substantial injury has resulted to petitioner requiring a reversal of the decree, but justice has been done, and it is respectfully submitted that the decree should be affirmed.

WM. G. BEALE,
Of Counsel for Respondent.

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OPINION IN CIRCUIT COURT OF APPEALS UPON FIRST APPEAL.
(39 C. C. A., 264; 98 Fed., 761.)

The appellant (plaintiff below), a life insurance company, is a corporation organized under the laws of the State of New York, and doing business in the City of New York. It brings this suit in equity against the defendant, Alice A. Cable, a citizen of Chicago, Ill., as administratrix of Herman D. Cable, to cancel a certain policy of insurance issued by the plaintiff upon the life of said Herman D. Cable in January of the present year. There was a general demurrer put in by the defendant to the bill of complaint, and this appeal is from an order and decree of the circuit court sustaining the said demurrer, and dismissing the bill for want of equity.

The facts, as alleged in the bill, are substantially as follows: on the 16th of January, 1899, Herman D. Cable, a resident of Evanston, Ill., made application in writing to the plaintiff for insurance upon his life in the sum of $50,000. The application was forwarded to the New York office of the plaintiff, and the plaintiff on or about the 17th day of February, 1899, executed its policy numbered 94,082, upon the life of Cable, agreeing, in further consideration of $848.50 to be paid on delivery thereof, and of a like sum to be paid on the 6th day of February in each and every year thereafter until 10 years' premiums should have been paid, and upon acceptance of satisfactory proofs of the death of Cable within 10 years, ending on the 6th day of February, 1909, that the plaintiff would pay $50,000 in 30 consecutive annual instalments of $1,666.66, to the estate of Cable, —subject, however, to certain terms and conditions

set forth in said policy and in the application therefor, one of which was that the policy should take effect only in case of delivery of the policy during the sound health and insurable condition of the insured. The policy, after its execution, was sent by the plaintiff to its agent in Chicago, Joseph H. Strong, and on or about the 21st day of February, 1899, was tendered to Cable, who refused to accept it or to pay the first premium thereon, saying that he wanted some further information about the plaintiff. When said Cable made his application for insurance, a like application was made by his friend, George S. Lord, also a resident of Evanston. A similar policy of insurance upon the life of Lord was issued by the plaintiff, and on the 27th day of February, 1899, was delivered: being actually handed to Lord by one James F. McCabe, an attorney and insurance broker of Chicago, through whom Lord and Cable had, by mutual arrangement, made their respective applications for insurance. On the last-mentioned date Lord learned from McCabe that Cable had not accepted his policy, and Lord thereupon requested said McCabe to obtain the policy written for Cable, and to bring it to him (Lord); saying that he (Lord) would take the policy, and would pay the first premium upon it in behalf of Cable. Thereupon, on the same day, McCabe obtained from the plaintiff, and delivered to Lord, the policy upon the life of Cable, and received from Lord the premium due thereon, and said premium was duly received by the plaintiff. On Friday evening, the 24th day of February, 1899, Cable became ill. During the following night or next day his illness was diagnosed as pneumonia, and his condition was then regarded as serious; and on Sunday, the 26th, his life was despaired of by the physicians. On Thursday, March 2nd, he died, as the result of acute

pneumonia. Lord was well aware of the serious physical condition of Cable on Sunday, February 26th, and knew that he was believed by his physicians to be suffering from pneumonia. On the morning of Monday, February 27th, and before Lord had seen McCabe on that day, Lord visited or communicated with the family of Cable, and on the afternoon of that day procured the delivery to him of the policy upon the life of Cable, with full knowledge of the dangerous illness of Cable, and of the stipulation in the policy and in the application that the policy should take effect only upon payment of the first premium, and upon its delivery during the sound health and insurable condition of Cable, and with the wrongful intent and purpose of having the policy become immediately effectual for the benefit of the estate of Cable in case his illness should terminate fatally. The plaintiff had no knowledge of Cable's illness until his death. That said illness was not made known to the plaintiff but was purposely and wilfully concealed from it, and, had the plaintiff known of his condition it would not have delivered to said Cable the policy, and the plaintiff never authorized the delivery of the policy through Lord under the conditions existing when Lord obtained it. The premium which Lord paid was paid with the funds of Lord, and not those of Cable. Cable never authorized Lord to accept the policy and pay for the same, and did not during his lifetime ratify what was done. Lord was not an agent of Cable for the purpose of receiving the policy and paying the premium. The procuring of the policy by Lord was not a delivery to Cable, and the procuring of the policy and its delivery by him to Cable individually did not create an effectual contract. In the forenoon of the same day, and an hour or more before the filing of the original bill in this case, the defendant began in the superior court of Cook County an action at law against the plaintiff for the computed

amount of said policy of insurance, laying the damages at $55,000, and caused a summons to be issued, which was served upon the agent of the plaintiff on the 15th day of May, 1899. The summons in this action was served upon the defendant on the day on which the bill was filed, to wit, on the 11th day of May, 1899. The bill further alleges, by way of showing that the plaintiff has not an adequate and complete remedy at law, that the state of Illinois, by legislative enactment, has sought to prevent the removal into this court by insurance companies of actions similar to this, and has destroyed such right, or made its exercise impracticable, by providing that insurance companies shall forfeit and lose their right to do business in the state of Illinois upon removing any such action into this court; that by removing the action to this court the plaintiff might lose its right to transact business in the state of Illinois, and would certainly become involved in a serious controversy with the state respecting the transaction of any subsequent business by the plaintiff therein; that the laws of the state upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the fact in this case, are somewhat different from the law as interpreted by the federal court upon the same questions, and, from the standpoint of the federal courts are unduly and erroneously adverse to insurance companies; that the plaintiff is entitled to an application of the law according to the decisions of the federal court, and that under the facts set forth in the bill the plaintiff is without a due and proper remedy at law in respect to the claim of the defendant under said insurance policy, and is without any remedy at law whatever in the United States court; that prior to the filing of the original bill the amount of the premium paid by Lord, with lawful interest thereon was offered

and tendered by the plaintiff to Lord and to the defendant in lawful money of the United States which was refused by them. Other facts and circumstances are alleged, but these are sufficient for the purpose of determining the question before the court.

Gilbert E. Porter, for Appellant.

W. S. Oppenheim, for Appellee.

Before Woods, *Circuit Judge*, and Bunn and Allen, *District Judges*.

Bunn, *District Judge*, after making the foregoing statement, delivered the opinion of the court.

It must, we think, be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and, if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States circuit court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: the first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the Constitution, has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. Second, the remedy open to

the plaintiff is one not under its own control, but in the control and discretion of the opposite party. These two principles, we think, are sufficient to confer a legal discretion upon the Federal court, which it ought to exercise, in favor of its own jurisdiction, in behalf of any person or corporation which, from its citizenship, has the undoubted privilege of having its rights adjudicated in the Federal court. The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy,* 3 Pet., 210; 7 L. Ed., 655; *Sullivan* v. *Railroad Co.,* 94 U. S., 806; 24 L. Ed., 324.

And the application of the rule depends upon the circumstances of each case. *Watson* v. *Sutherland,* 5 Wall., 74; 18 L. Ed., 580.

In the Federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the Federal court. This was adjudicated as early as 1823, in *Mayer* v. *Foulkrod,* 4 Wash. C. C., 349; Fed. Cas. No. 9,341. That was a case in equity for the recovery of a legacy, and it was suggested that the complainant had a remedy at law in the state court; but the court, by WASHINGTON, J., said:

> "If the counsel for the defendant meant to argue that, because the plaintiff might have maintained an action in the state court for the recovery of the legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy on the other side of this court. It is no argument to say that the plaintiff may have such a remedy

(could it even be truly said) in the state court. The conclusive answer is that the plaintiff is under no obligation to resort to that jurisdiction."

Bean v. *Smith*, 2 Mason, 252 Fed. Cas. No. 1,174, is a still earlier case,—decided in 1821; opinion by Mr. Justice STORY. This was an action in equity to set aside conveyances for fraud. The court, in its opinion, says:

"The other objection is not so much to the competency of the court, as in the nature of a demurrer to the bill for want of equity. Much stress has been laid upon that clause of the Judiciary Act of 1789 (Chapter 20, Sec. 16) which declares 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.' I take this clause to be merely affirmative of the general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts. It has been repeatedly held by the Supreme Court that the equity jurisdiction of the courts of the United States does not depend upon what is exercised by courts of equity or courts of law in the several states, but depends upon what is a proper subject of equitable relief in courts of equity in England, the great reservior from which we have extracted our principles of jurisprudence. If, therefore, a bill of this sort states a case properly within the cognizance of courts of equity, according to the general doctrines of their jurisprudence, I should have no difficulty in overruling this objection, although the state courts of Rhode Island might afford some sort of remedy at law to aid the plaintiff. There are many cases in which courts of law and equity exercise a concurrent jurisdiction, and the judiciary act never intended to disturb that jurisdiction. In such cases it is supposed that the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief."

In the leading case of *Smyth* v. *Ames*, 169 U. S., 466; 18

Sup. Ct., 418; 42 L. Ed., 819, it is said in the very able opinion by Mr. Justice HARLAN that:

> "The adequacy or inadequacy of a remedy at law for the protection of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity wherever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. Case of *Broderick's Will*, 21 Wall., 503; 22 L. Ed., 599; *Holland* v. *Challen*, 110 U. S., 15; 3 Sup. Ct., 495; 28 L. Ed., 52; *Dick* v. *Foraker*, 155 U. S., 404, 415; 15 Sup. Ct., 124; 39 L. Ed., 201; *Bardon* v. *Improvement Co.*, 157 U. S., 327, 330; 15 Sup. Ct., 650; 39 L. Ed., 719; *Rich* v. *Braxton*, 158 U. S., 375; 15 Sup. Ct., 1006; 39 L. Ed., 1022. But if the case, in its essence, be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States wherever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of Federal jurisdiction."

Coler v. *Board* (C. C.), 89 Fed., 257, was a bill by the holders of county bonds to prevent the county officials from applying certain funds to any purpose except to pay the interest coupons. The defendants questioned the jurisdiction of the court on the same ground relied upon here. The court, by SIMONTON, C. J., in disposing of the question, says:

> "Such a remedy might, perhaps, be found in the practice under the Code of North Carolina, but this will not affect the ancient and well-established jurisdic-

tion of the court of equity. The adequacy or inadequacy of a remedy at law for the protection of one entitled on any ground to invoke the powers of a Federal court is not to be conclusively determined by the statute of the particular state in which suit may be brought. *Smyth* v. *Ames,* 169 U. S., 516; 18 Sup. Ct., 418; 42 L. Ed., 819. The test is, has he a remedy at law in this court? If he has not, then a court of equity has jurisdiction."

In *Stanton* v. *Embry,* 46 Conn., 595, a bill was filed to enjoin an action at law upon a judgment rendered in the District of Columbia.

In the opinion, by PARDEE, J., it is said:

"It is claimed by the counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial,—a remedy which, it is claimed, is open to the petitioners under the laws of the District of Columbia,—is an adequate legal remedy, and that this court cannot assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered adequate which a party is compelled to go into a foreign jurisdiction to avail himself of. It must be a remedy which our own courts can apply."

Suits for the cancellation and delivery up of conveyances, insurance policies, and other contracts, obtained by fraud, constitute an immemorial head of equity jurisdiction. Joyce, in his elaborate work on Insurance (Sec. 1674), says:

"If the contract is obtained by fraud or deception, or by false and fraudulent misrepresentations, . . . equity will take cognizance and grant relief. So, also, will jurisdiction be entertained if the party has no adequate remedy at law. But the fact that the party has an adequate remedy at law does not of necessity preclude a resort to equity, nor does it follow that for such reason a court of equity will refuse to entertain jurisdiction. If the special circumstances would render it inequitable, unjust, or a hardship to compel the

> plaintiff to await a suit at the instance of the other party, the court will exercise its power."

This, no doubt, is now the reasonable and well-established rule.

The case of *British Equitable Assur. Co.* v. *Great Western Ry. Co.*, 20 Law T., 422, was a case of the procurement of a policy of life insurance by a gross fraud, similar to the one practiced in this case, if the allegations of the bill be true. It was brought, also, as in this case, after the death of the insured. The same objection was made to the jurisdiction as is made in the case at bar. Lord Justice GIFFARD, in his opinion concurring in the main opinion, says:

> "I was surprised, I must say, to hear the question of jurisdiction argued in this case. If there is any one thing clearer than another, it is that in such a case as this this court has jurisdiction."

In that case the policy had been assigned before suit brought, but equity took jurisdiction to decree a cancellation; and Lord Justice SELWYN, after stating the circumstances of the fraud, concludes his opinion in these words:

> "Under these circumstances, therefore, I think it quite clear that the policy is a void policy, and one which the office was entitled to file a bill to have canceled and delivered up; and, considering the very serious consequences to insurance companies of disputing upon any other than very clear ground, in this case, as I have formed a very clear opinion that in my judgment they were fully justified in resisting this claim, that there was no foundation for this appeal, and that it must be dismissed with costs."

The fraud in the case at bar does not rest upon proof. It stands admitted by the answer. The deceased applies for an insurance upon his own life for $50,000. He answers all the questions in regard to his physical condition in a

satisfactory manner. He is physically sound when the application is made and the policy tendered. But he declines to receive it, because he wants to know something more of the company before investing. Afterwards, and before anything more is done, he is taken down with acute pneumonia, and his chances for life are desperate. His friend now steps in, knowing all the facts in regard to the changed condition of the assured, pays the premium, and takes a delivery of the policy to himself; the company knowing nothing of assured's sickness. That day, or the day but one after, the assured dies, as it was expected he would. The fraud perpetrated is something quite appalling, in the baldness and boldness of its outlines. Upon the allegations of fact in the bill which are admitted to be true, it stands out "gross as a mountain, open, palpable." Under the circumstances, it seems hardly incumbent on the court to make excuses for taking jurisdiction in equity to cancel the policy, without subjecting the company to the uncertainty and delay attending a litigation in the state court, over which it can exercise no essential control, but the jurisdiction of which rests substantially in the will and discretion of another party. Upon the hearing on the merits, if the evidence should present the case in any other light, and it should appear that the remedy at law would be adequate, the bill could then be dismissed.

Mr. Joyce (Joyce Ins., Secs. 1764, 1680) sums up the authorities on this subject in the following words:

> "The result of the cases seems to be this: that, if equitable interposition is sought before loss or death, the right of the plaintiff to the aid of the court is better than it would be were he to wait until after loss or death, when the question might arise whether his remedy by way of defense to an action at law on the policy would not be adequate, and when it would be necessary

to show that some obstacle prevented making the defense at law. In other words, having no remedy at law before loss, the case presented by a bill brought after loss would have to show, notwithstanding a then existing adequate remedy at law, that resort to equity was necessitated by some particular circumstance of equitable cognizance warranting equitable relief; and it would seem reasonable to state as a rule that the fact that the loss has occurred is not conclusive, and upon a proper averment of facts showing that a resort to equity is either necessary, expedient, or proper, or that some obstacle prevents a complete defense at law, the court may, in a reasonable and proper exercise of that discretion which is generally exercised in matters of cancellation, take cognizance and grant relief."

The case of *Insurance Co.* v. *Bailey,* 13 Wall., 616; 20 L. Ed., 501, is relied upon to show that a suit in equity cannot be maintained to cancel a policy after the death of the insured. But the case does not go quite so far as that. The case was heard in the circuit court upon the merits, and the bill dismissed because it appeared that an action at law was then pending in the same court upon the law side, and that the remedy which the complainant could avail himself of there would be adequate; and the supreme court affirmed the decree. What the court held was that, although equity had power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppressions of facts, yet it will not generally do so, when these representations and suppressions can be perfectly well used as a defense at law in a suit upon the policy. Here the suit at law was pending in the same court. There was no invitation to the plaintiff to go into another jurisdiction to seek an adjudication of his rights. The point was not raised nor adjudicated as to whether a remedy at law could be adequate, and as effectual as the

remedy in equity, where the complainant had not the remedy under his own control. In the recent case of *Bank* v. *Stone* (C. C.), 88 Fed., 383, heard before Mr. Justice HARLAN, sitting with the two circuit judges, this question seems to have been adjudicated. A bill was filed to restrain collection of taxes under an act of the legislature of Kentucky, upon the ground that the act was unconstitutional, in that it impaired the obligation of the contract contained in the bank's charter from the state. The case, like this, was heard upon demurrer to the bill. In answer to the same contention that is made here,—that an adequate remedy at law existed,—the court, by Mr. Justice HARLAN, says:

> "It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary choose to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

And this rule seems perfectly reasonable and sound. A similar rule is applied in cases where a claim to real estate is set up against a party in possession, though in that case other considerations concur. The party in possession need not wait for an action of ejectment by his adversary, but may file his bill in equity to quiet the title and have the claimant's title adjudicated. It is, no doubt, true that the plaintiff, if it was willing to incur the loads and forfeitures imposed by the Illinois statutes upon foreign corporations doing business in that state, and who attempt to remove actions from the state to the Federal court, might go into the state court and have the action at law removed to the Federal

court. *Insurance Co.* v. *Morse,* 20 Wall., 445; 22 L. Ed., 365. *Barron* v. *Burnside,* 121 U. S., 186; 7 Sup. Ct., 931; 30 L. Ed., 915. *Southern Pac. Co.* v. *Denton,* 146 U. S., 202; 13 Sup. Ct., 44; 36 L. Ed., 377.

But when it came there it would not have control of it. The plaintiff in that cause would control the action. She could bring it to trial, or she could delay as long as possible, and then discontinue it; wait for the plaintiff's witnesses to die or go beyond the jurisdiction of the court, and then commence again in the same or some other state court. It would be in her discretion to say when and where the defendant should have his remedy. A remedy so much in the discretion and control of the adversary party can hardly be said to be as efficient practically as the one in equity to cancel the policy. Very likely the plaintiff would choose to try the case in the state court, rather than subject itself to the penalty of losing its business in the state. But should the plaintiff be put to such an election, under the circumstances of the case? It is quite evident the plaintiff has had no opportunity to bring this action before the death of the assured, because that death took place immediately after the delivery of the policy to Lord.

We are therefore of opinion, under the allegations of the bill,—the Federal court having, by the comencement of the suit, obtained jurisdiction both of the subject-matter and of the parties, and the only objection being that the plaintiff has an adequate remedy at law,—that the court should have entertained the cause and overruled the demurrer to the bill. The decree of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

XV

FROM ILLINOIS INSURANCE LAWS.

[FIRE INSURANCE.]

(Hurd's Revised Statutes, 1898, page 932, Par. 68.)

Section 22. It shall not be lawful for any insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; nor shall it be lawful for any mutual insurance company of any other State to transact any kind of business within this State other than that prescribed by section 13 of this act, unless said company is possessed of an amount of cash assets over and above all liabilities, including reinsurance reserve equal to the amount of capital stock required of stock companies; and any such company desiring to transact any such business as aforesaid, by any agent or agents in this State, shall first appoint an attorney in this State, on whom process of law can be served, and file in the office of the Auditor of Public Accounts a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this State and served upon such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company; but service of process upon such company may also be made in any other manner provided by law.

In case any insurance company not incorporated in this State shall cease to transact business in this State, according to the laws thereof, the agents last designated, or acting as

such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the causes aforesaid upon any such agent, shall be deemed a valid personal service upon such corporation.

And every such company, association or partnership shall also file a certified copy of their charter or deed of settlement, together with a statement, under the oath of the president or vice-president, or other chief officer, and secretary of the company for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in bank or in the hands of agents; the amount of real estate and how much the same is encumbered by mortgage; the number of shares of stock of every kind owned by the company; the par and market value of the same; amount loaned on bond and mortgage; the amount loaned on other security, stating the kind and the amount loaned on each, and the estimated value of the whole amount of such securitites; any other assets or property of the company; also stating the indebtedness of the company; the amount of losses adjusted and unpaid; the amount incurred and in process of adjustment; the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; also a copy of the last annual report, if any, made under any law of the State by which such company was incorporated; and no agent shall be allowed to transact business for any such company whose capital (or, if a mutual company, whose reinsurance reserve as required in section 13 of this act) is impaired to the extent

of twenty per cent. thereof, while such deficiency shall continue.

And any company incorporated by or organized under any foreign government shall, in addition to the foregoing, deposit with the Auditor of Public Accounts, for the benefit and security of policy holders residing in the United States, a sum not less than two hundred thousand dollars ($200,000), in stocks of the United States, or of the State of Illinois, in all cases to be equal to a stock producing six per cent. per annum—said stocks not to be received by said Auditor at a rate above their par value, or above their current market value—or in bonds and mortgages on improved unincumbered real estate in the State of Illinois, worth fifty per cent. more than the amount loaned thereon.

The stocks and securities so deposited may be exchanged, from time to time, for other securities, receivable as aforesaid.

And so long as the company so depositing shall continue solvent, and comply with the laws of this State, such company or association may be permitted by the said Auditor to collect the interest or dividends on said deposits; and where a deposit is made of bonds and mortgages, accompanied by full abstracts of title and searches, the fees for an examination of title by counsel, to be paid by the party making the deposit, shall not exceed twenty dollars for each mortgage, and the fee for an appraisal of property shall be five dollars to each appraiser, not exceeding two, besides expenses for each mortgage.

Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State, without procuring from the Auditor of Public Accounts a

certificate of authority, stating that such company has complied with all the requisitions of this act which apply to such companies, and the name of the attorney appointed to act for the company.

The statement and evidences of investments required by this section shall be renewed from year to year, in such manner and form as may be required by said Auditor, with an additional statement of the amount of premiums received and losses incurred in this State during the preceding year, so long as such agency continues; and said Auditor, on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificate, as aforesaid.

Any violation of any of the provisions of this act shall subject the party violating the same to a penalty of five hundred dollars ($500) for each violation, and of the additional sum of one hundred dollars ($100) for each month during which any such agent shall neglect to file such affidavits and statements as are herein required.

Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the State or government under the laws of which it is organized. The term "agent" or "agents" used in this section shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State.

The provisions of this section shall apply to all foreign companies, partnership associations and individuals whether incorporated or not. All insurance companies, as-

sociations or partnerships incorporated by or organized under the laws of any other State of the United States, or any foreign government, transacting the business of fire or marine insurance, or any other kind of insurance, in this State, shall make annual statements of their condition and affairs to the Auditor's office, in the same manner and in the same form as similar companies organized under the laws of this State.

In case of neglect or refusal to make such annual statement as aforesaid, all persons acting in this State as agents or otherwise, in transacting the business of insurance for said companies, corporations, associations, partnerships or individuals, shall be subject to the same penalties provided by law in case of the failure of any insurance company organized under the laws of this State to make an annual statement, as provided in this act.

Foreign insurance companies shall be required to make and file their annual statements and evidences on the first day of January in each year, or within thirty days thereafter, made out for the year ending on the preceding 30th of September. The supplementary annual statements of their business and affairs in the United States, duly verified by the resident manager of such company, shall be filed in the month of January in each year, made out for the year ending the 31st day of December, immediately preceding.

FROM ILLINOIS INSURANCE LAWS.

[COMPANIES NOT ORGANIZED IN THE UNITED STATES.]

(Hurd's Revised Statutes, 1898, page 922, Par. 40.)

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* It shall not be lawful for any insurance company, association, partnership or organization, incorporated by, or organized, or doing business under the laws of any foreign government, directly or indirectly, to take risks or transact any business of insurance in this State unless the sum of at least two hundred thousand dollars, ($200,000) in stocks of the United States, or of the State of Illinois, reckon at par, or in bonds and mortgages on improved unincumbered real estate in the State of Illinois worth fifty per cent. more than the amount loaned thereon shall be deposited with the insurance department of one of the States of the United States, for the benefit and security of all policy holders in the United States which said deposit, shall, for the purposes of this act be known as the capital of said company for the United States; and any such company desiring to transact any such business as aforesaid, by any agent or agents, in this State, shall first appoint an agent in this State, on whom process of law can be served, and file in the office of the Auditor of Public Accounts, a writtcn instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this State, and served upon such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner now

provided by law. In case any such insurance company or association shall cease to transact business in this State, according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the causes aforesaid, upon any such agent, shall be deemed a valid personal service upon such corporation. And every such company association or partnership, shall file a copy of their charter, deed of settlement or article of association, together with a statement under oath, of its president or vice-president, or other chief officer or resident manager, stating the name of the company, association or partnership, and place where located, the amount of its capital and assets in detail, deposited and held in the United States including the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how much the same is encumbered, the number of shares of stock of every kind owned by it, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other security, stating the kind and amount loaned on each, and the estimated value of the whole amount of such securities and assets; such statement shall not, however, include any deposits in any of the United States not made for the benefit and protection of all policy holders throughout the United States, nor shall any special deposits for the exclusive protection and benefit of policy holders in any one State, be treated as assets of said company under this act: Said statement shall also state the indebtedness of the company, the amount of its losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted

by it as illegal and fraudulent and all other claims existing against it in the United States. And no agent shall be allowed to transact business for any such company, association or partnership, whose capital deposited as aforesaid, is impaired to the extent of twenty per cent. thereof, while such deficiency shall continue, and every such company, association, or partnership, may, if it desires, also file a statement, under the oath of its president or vice-president, or other chief officer, of the amount of its capital and assets in detail held or deposited in any country other than the United States, showing the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how much the same is encumbered by mortgage, the number of shares of stock of every kind, owned by the company, the par and market value of the same, amount loaned on bond or mortgage, the amount loaned on other securities, stating the kind and amount loaned on each, and the estimated value of the whole amount of such securities and other assets, together with its indebtedness, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by it as illegal and fraudulent, and all other claims existing against it in the United States or elsewhere. And when any such company or association, shall file with the Auditor of Public Accounts, a certificate of the superintendent of the insurance department of any other State, stating that a deposit of two hundred thousand dollars, ($200,000) or more, or its equivalent for the protection of the policy holders in the United States, has been made by said company or association in that State in accordance with the existing laws of said State. Said company or association shall not be required to make any deposit in this State, so long as said deposit shall remain intact with the insurance department or treasurer of said State, a cer-

tificate of which, from the superintendent of the insurance department of that State, shall be annually filed with the Auditor of Public Accounts of this State, and so long as such company, association or partnership, shall continue solvent and continue possessed of such capital in the United States, and comply with the laws of this State, it may make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire and the risks of inland navigation and transporation and transact a general insurance business. It shall not be lawful for any agent or agents to act for any company or association or partnership referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland insurance in this State without procuring from the Auditor of Public Accounts, a certificate of authority, stating that such company has complied with all the requisitions of this act; and the name of the attorney appointed to act for the company, association or partnership. The statement and evidences of capital required by this section shall be renewed from year to year in such manner and form as may be required by said Auditor, with an additional statement of the amount of premiums received and losses incurred in this State during the preceding year, so long as such agency continues; and the said Auditor, on being satisfied that such capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificates as aforesaid. Any violation of any of the provisions of this act, shall subject the person violating the same to a penalty of five hundred dollars, for each violation, and the additional sum of one hundred dollars for each month during which any such agent shall neglect to file such affidavits and statements as are herein required. Every agent of any in-

surance company, association or partnership, herein referred to shall in all advertisements of such agency, publish its location, giving the name of the city, town or village, where its principal or home office is located, and the government under the laws of which it is organized or does business. The term "agent" or "agents" used in this section shall include any acknowledged agent, surveyor, broker, or any other person or persons, who shall in any manner aid in transacting the business of any insurance company not incorporated by the laws of one of the United States. The provisions of this section shall apply to all foreign companies, partnerships, associations, and individuals, whether incorporated or not. The statement and evidences of investment required by this act shall be renewed annually, in the month of January of each year, the statement of capital and business in the United States to be verified by the resident manager and to be made out for the year ending, December 31, immediately preceding; and in case a statement of the business affairs and property of the home office is filed, such statement shall also be for the year ending December 31st, next preceding; and the Auditor of State, on being satisfied that the capital, securities and investments remain secure shall furnish a renewal of such certificate. Unless a home office statement of the capital and affairs of any company or association is filed with the Auditor of Public Accounts as herein provided, neither it nor any agent shall be permitted to advertise any capital or assets not held or deposited in the United States; nor shall such company or association or its agent or agents be permitted to advertise as capital deposited in the United States a greater sum than the actual value thereof.

All acts or part of acts in conflict herewith, are hereby repealed.

XXV

FROM ILLINOIS INSURANCE LAWS.

[LIFE INSURANCE.]

(Hurd's Revised Statutes, 1898, page 952, Pars. 183, 187, 195, 201, 202, 203, 204.)

Section 3. It shall not be lawful for any person to act within this state, as agent or otherwise, in receiving or procuring applications for life insurance, or in any manner to aid in transacting the business of life insurance, referred to in the first section of this act, for any company or association incorporated by or organized under the laws of any other state government, unless such company has conformed, in such state or in this state, to the same requirements in regard to capital that are imposed by section one of this act upon companies in this state, or, in lieu thereof, has actual assets to the amount of at least $100,000, invested in the same manner as is prescribed in regard to capital in section one of this act.

Section 7. All life insurance companies chartered or organized in any other state of the United States, or beyond the limits of the United States, and doing business in this state, shall make an annual statement of their condition and affairs to the insurance department, in the same manner and in the same form as similar companies organized under the laws of this state. The auditor shall have authority to extend the time for filing such statement, for reasons which he shall deem good and sufficient, whether the company is organized in this state or elsewhere. The statements herein provided for shall be in lieu of any and all statements now required by any existing law; and the several provisions of the act approved February 12th, 1853, February 14th, 1855, and January 22d, 1857, are hereby repealed, so far as they relate to life insurance.

Section 15. Every life insurance company not organized in this state, before doing business in this state, shall, in writing, appoint an attorney, resident in this state, upon whom all lawful process against the company may be served with like effect as if the company existed in this state; and said writing or power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company which is served on said attorney, shall be of the same legal force and validity as if served on said company. A copy of the writing, duly certified and authenticated, shall be filed in the office of the auditor, and copies certified by him shall be sufficient evidence. This agency shall be continued while any liability remains outstanding against the company in this state, and the power shall not be revoked until the same power is given to another, and a like copy filed as aforesaid. Service upon said attorney shall be deemed sufficient service upon the company.

Section 21. Every life insurance company not organized under the laws of this state shall, before doing business in this state, deposit with the auditor a copy of the charter of the company, and a statement signed and sworn to by the president or vice-president and secretary, in the form prescribed or authorized for the annual statement adapted to the business done by such company.

Section 22. Every person acting for a life insurance company not incorporated in this state, shall exhibit, in conspicuous letters, on the sign designating his place of business, the name of the state, under whose authority the company he represents has been incorporated; and said company and agents shall also have printed, in large type, the name of said state upon all policies issued to the citizens of this state, and on all placards, pamphlets and circulars pub-

lished, issued or circulated in this state by them or him, relating to the business of said company.

Section 23. Whoever solicits insurance on behalf of any life company not chartered by and not established within this state, or transmits, for any person other than himself, an application for life insurance, or a policy of life insurance, to or from such company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company to all intents and purposes, and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this state relating to life insurance companies not incorporated by the legislature thereof.

Section 24. Any agent making insurance in violation of any law of this state regulating life insurance companies shall forfeit, for each offense, a sum not exceeding $500.

FROM ILLINOIS INSURANCE LAWS.

[INSURANCE DEPARTMENT.]

(Hurd's Revised Statutes, 1898, Page 915, Pars. 1 & 3.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That there shall be established a separate and distinct department to be known as the "Insurance Department of the State of Illinois," which department shall be charged with the execution of all laws now in force, or which shall hereafter be enacted, in relation to insurance and the insurance companies organized or doing business in the State of Illinois, and the chief officer of such department shall be styled the "Insurance Superintendent."

SECTION 3. The Insurance Superintendent shall possess all the powers and perform all the duties in regard to the business of insurance which are now attached by law to the office of the Auditor of Public Accounts, and he shall exercise the same control over the insurance companies, their officers and agents in this State, and collect from them all taxes, fees, fines and penalties as required by the laws of the State to be done by the Auditor of Public Accounts; and the said Auditor of Public Accounts is hereby relieved therefrom, from and after the appointment and qualification of such Insurance Superintendent.

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3588

Opp'n to Beale's Pet. 28

Office Supreme Court U.S.
FILED
OCT 16 1903
JAMES H. McKENNEY,
Clerk.

SECTION 23 OF ILLINOIS LIFE INSURANCE ACT OF 1869.
(Hurd's Revised Statutes for 1901, page 1057.)

Whoever solicits insurance on behalf of any life company not chartered by and not established within this State, or transmits, for any person other than himself, an application for life insurance, or a policy of life insurance, to or from such company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company to all intents and purposes, and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this State relating to life insurance companies not incorporated by the Legislature thereof.

Compare with section on p. 15 post

Schlenk case, p. 2.

Thomas " p. 11

THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. SCHLINK, 175 Ill., 285.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. M. Shaw, Judge, presiding.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action brought by Paulina Schlink on a policy of insurance issued on July 22, 1895, by the John Hancock Mutual Life Insurance Company on the life of Frederick Schlink. In the declaration the policy was set out *in haec verba*, and it was averred that the policy was delivered to Frederick Schlink on the 7th day of August, 1895, and that he died on the 12th day of the same month. To the declaration the defendant pleaded the general issue, and also filed four special pleas, in which it set up a provision of the policy which reads as follows: "This policy shall not take effect until delivered and the first premium hereon paid during the lifetime and good health of the insured." Defendant averred that the policy was not delivered and the first premium paid during the lifetime and good health of the insured. To the pleas the plaintiff replied double: First, she traversed the facts set up in each plea; and second, she confessed the allegations of facts set up in the pleas and set up new matter in avoidance. In the replications confessing and avoiding it was averred that there was a waiver of the conditions of the policy on the part of the insurance company. To the replications rejoinders were filed, and on a trial before a jury the plaintiff recovered a verdict for $2175, upon which the court entered judgment, which, on appeal, was affirmed in the Appellate Court.

The appellant has assigned on the record six errors, three of which, the first, second and fifth, involve questions of fact which have been settled by the judgment of the Appellate Court and need not be considered here. The others, the third, fourth and sixth, are as follows:

"*Third*—The Appellate Court erred in holding that appellee's first, fourth, fifth and sixth instructions, or either of them, were the law.

"*Fourth*—The Appellate Court erred in holding that the trial court properly refused each of appellant's first, second, third, fourth and tenth refused instructions.

"*Sixth*—The Appellate Court erred in sustaining the rulings of the trial court in the admission and rejection of evidence."

In order to obtain a clear view of the questions of law presented by the record a brief statement of the facts is required. In the opinion of the Appellate Court will be found a statement of the facts which seems to be substantially correct, as follows:

"Charles Ballance was acting as agent for appellant at Peoria under a contract with J. B. Pendergast, the State agent of the appellant for the State of Illinois. Ballance had an office in Peoria, which had upon it a business sign designating him as general agent of appellant, and upon the stationery used by him he so called himself. While purporting to act as such agent Ballance solicited Frederick Schlink, appellee's husband, to take out a policy of insurance upon his life in appellant's company. After some negotiations between the parties an arrangement was made between Ballance and Schlink for the issuance of a policy on the life of the latter for $2000, upon which the premium was to be $63.70. In payment of this premium it was agreed by the parties that a certain indebtedness of $18, owing by one Downey to Schlink, should be assumed by Ballance and canceled, and that Ballance should take and receive from Schlink, in further part payment of the premium, a sewing machine to be selected by the wife of Ballance from the machines which Schlink had on hand for

sale, and the difference either way was to be paid in cash,—that is, if the machine and the Downey indebtedness amounted to more than the premium, Ballance should pay the difference in cash to Schlink, and on the other hand, if these two items did not pay the premium, Schlink should pay Ballance the difference in cash. In accordance with this agreement Frederick Schlink made and delivered to Ballance a formal application for a policy of insurance upon his life for the sum of $2000, which was forwarded by said Ballance to appellant company, which accepted the risk, issued the policy and forwarded the same to Ballance for delivery. After receiving the policy Ballance saw the assured, Frederick Schlink, and notified the latter he had the policy, and was told to come and get the sewing machine and the money for the premium. Before the policy was actually delivered the assured became ill with typhoid fever, whereupon the agent, Ballance, called on George Schlink, a brother of the assured, and informed him about the agreement and the policy, and told said George Schlink that if he would pay $25 he (the agent) would put the policy in force. After seeing the attending physician, said George Schlink went to the office of Ballance to pay the money and get the policy. Ballance being absent, his clerk accepted the $25 and delivered the policy. Three days afterwards the assured, Frederick Schlink, died from the effects of the typhoid fever."

The contract under which Ballance was appointed agent contained these provisions: "The said J. B. Pendergast hereby appoints said Charles Ballance agent, with authority to procure applications for policies of insurance upon the lives of individuals, and to collect premiums, in accordance with the rules of said company. * * * The said party of the second part, as said agent, shall in no case alter, modify, waive or change the terms, rates or conditions of any paper or document issued by said company, nor receive moneys due or to become due to said company except on policies or renewal receipts signed by an officer of said company."

It is contended in the argument of counsel for appellant —first, that Ballance was the agent of Pendergast, and not the agent of appellant, and hence he could not bind the company; second, that by the language of the policy, "no person except the president or secretary is authorized to make alterations or discharge contracts or waive forfeitures," although Ballance was the agent of the company he could not waive compliance with any of the provisions of the policy; third, that Ballance, although the agent of the company, could not accept anything in payment of the first premium but cash, nor could he waive performance of the rules of the company.

In the giving and refusing of instructions the court held adversely to appellant on the propositions mentioned, and what will be said in passing on the propositions will dispose of the third and fourth assignments of error without setting out the instructions given for the plaintiff and refused for the defendant.

As to the first proposition, by the terms of the contract under which Ballance was appointed he was authorized to procure applications for policies of insurance upon the lives of individuals, and to collect premiums, in accordance with the rules of the company. He was entrusted with the power of delivering policies for the company. Clothed, therefore, with the power of soliciting insurance, delivering policies and collecting premiums, Ballance was the agent of the insurance company, and not the agent of Pendergast. (Hurd's Stat. chap. 73, par. 203; *Continental Ins. Co.* v. *Ruckman*, 127 Ill. 364.) In the *Ruckman case* it was said (p. 376): "The General Assembly having power to impose upon foreign insurance companies coming into the State to do business, such reasonable terms and conditions

as it saw fit, had an undoubted right to make such companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents and in fact aid them in the transaction of their insurance business." The fact that the written contract under which Ballance was acting was made by Pendergast, State agent of the insurance company, did not constitute him an agent of Pendergast. Ballance advertised as general agent of the company. He acted for and in behalf of the company. The company accepted his acts and forwarded policies to him to be delivered in pursuance of contracts made by him.

As to the second contention, while it is true that the policy provides that no person except the president or secretary is authorized to make alterations, discharge contracts or waive forfeitures, yet if Ballance was the agent of appellant, as we think he was, with power to solicit insurance of Schlink, receive the application, forward it to appellant, receive the policy when issued, collect the premium and deliver the policy, then he had power to waive a condition of the policy. In Richards on Insurance (2d ed. sec. 95) the author says: "An agent of a life insurance company who is intrusted with the business of closing the contract by delivering the policy is held to have an implied authority to determine how the premium then due shall be paid, whether by cash, or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured and the debtor of the insurer. In that event, though the agent subsequently defaulted and the money never reached the company, the policy would still be binding. By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it; but this

is based upon his possession of the document for the purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to subsequent premiums or premium notes."

In *Eclectic Life Ins. Co.* v. *Fahrenkrug,* 68 Ill. 463, it was said (p. 467): "It is insisted * * * by the terms of the policy the agents are prohibited from altering or discharging contracts or waiving forfeitures. This objection we do not deem tenable. The question in cases of this kind is not what power did the agent in fact possess, but what power did the company hold him out to the public as possessing. * * * It is immaterial what may have been said in the policy in regard to the payment of the premium. It was within the power of the company, acting through its agents, to change entirely the mode of or dispense with the payments as provided by the policy and adopt a different mode and time of payment."

In *Phenix Ins. Co.* v. *Hart,* 149 Ill. 513, this court said (p. 522): "The cases are not uniform throughout the country in respect of when notice to or knowledge of the agent, or representations by him, will bind the company. In this State, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent," citing *Atlantic Ins. Co.* v. *Wright,* 22 Ill. 462, and *Farmers and Merchants' Ins. Co.* v. *Chesnut,* 50 *id.* 111. Also, in the same case it was said (p. 524): "The stipulation in the policy that the waiver could be made only by indorsement upon the policy by the general agent at Chicago was inserted for the benefit of the insurer, and, like any other clause or condition of the policy,

might be waived by the company." See, also, *Terry* v. *Provident Fund Society,* 41 N. E. Rep. 18; 13 Ind. 1.

We now come to the third contention of appellant: that the agent, in the absence of express authority, could not accept anything but cash in payment of the premium, or any part thereof. It will be remembered that the premium in this case amounted to the sum of $63.70. Of this amount Ballance was entitled to retain, as his commission, seventy or seventy-five per cent, which would leave less than $20 going to the company. Ballance received $25 in cash,—enough to pay the company the amount it was entitled to receive and $5 in addition. The question then presented is, whether Ballance had the right to receive of the insured the amount which was going to him in anything but money. The policy contained this provision: "This policy shall not take effect until delivered and the first payment thereon paid during the lifetime and good health of the insured." There are authorities which hold that an agent cannot accept the premium which the company is entitled to receive, in anything but cash; but there are other authorities holding that a general agent may give credit and accept the note of the insured in lieu of cash, even when the policy provides for a cash payment. Mechem on Agency says (sec. 931, div. 1): "The insurance agent, as thus distinguished from the broker, is ordinarily held to be a general agent of the company. As such general agent it is held that he may waive forfeitures and conditions in the policy, notwithstanding a provision therein that no agent has such power; that he may waive pre-payment of the premium although the policy provides that it shall not take effect until the premium is paid." May on Insurance (vol. 2, sec. 360 b) says: "An agent authorized to take and approve risks and to in-

sure may allow credit. A general agent may waive the condition as to the payment of the first premium and give credit, even though the policy declares that the contract cannot be modified except by writing signed by the president or secretary." *Terry* v. *Provident Fund Society, supra,* is also a case in point. There the policy contained, in substance, the same conditions as here. One Carpenter (who was not a regular agent of the company) solicited the insurance. The policy was issued by the company and sent to an agent, who delivered it to Carpenter to deliver to the insured and collect the premium. Carpenter delivered the policy, collected $2.50 (one-half the premium) in cash and gave credit for $2.50, which was his commission. The cash premium failed to reach the company and it canceled the policy, but an accident having occurred the company was held liable. In *Lycoming Ins. Co.* v. *Ward,* 90 Ill. 545, where the agent accepted a part of the premium in goods as a part of his commission, it was held the payment was binding on the company. Here Ballance was authorized to solicit the insurance from Schlink, and although the policy required the premium to be paid in cash, Ballance had the right, so far as his commission was concerned, to waive the policy and accept his commission in property, if he saw proper to do so.

We think the ruling of the court on the instructions was substantially correct.

After the death of the assured it appears that Ballance wrote a letter to the State agent, Pendergast, which was read in evidence by appellee. Pendergast wrote a letter in reply, which the court refused to admit in evidence, and this ruling is relied upon as error. At the time this letter was written the assured was dead and the rights and obli-

gations of the parties under the policy had become fixed, and anything the State agent may have said in the letter could have had no bearing whatever on the rights of the parties. For this reason, if for no other, the court properly ruled that the letter was not competent evidence.

We think the judgment of the Appellate Court was right, and it will be affirmed.

Judgment affirmed.

UNITED FIREMEN'S INS. CO. v. THOMAS,
34 C. C. A. 240; 92 Fed. 127.

On Rehearing.

Before WOODS, JENKINS, and SHOWALTER, *Circuit Judges.*

JENKINS, *Circuit Judge.* The facts in this case are sufficiently stated in our former opinion. 53 U. S. App. 517, 27 C. C. A. 42, and 82 Fed. 406. We granted a rehearing of the case principally for a discussion of the question whether Prindiville, either as a matter of law or as a matter of fact, could be deemed the agent of the insurance company, appellant, in effecting the insurance in question. Aided by the oral arguments at such rehearing, and in view of certain decisions of the supreme court of the state of Illinois, we have carefully considered the case, both with respect to the question whether such agency can be deemed established as matter of fact or as matter of law, and the further question whether, under the statute of the state of Illinois, he must be deemed to be the agent of the insurance company because he participated in procuring the insurance in question. The evidence to our minds is undisputed and conclusive that Prindiville had never been in the service of this insurance company, was never authorized by it or its general agents to procure any insurance for it, was employed by the defendant in error to procure insurance for him in such companies as he might approve; that he placed such insurance in several companies, applying to the general agents of the plaintiff in error for a policy in that company; that he signed, on behalf of the defendant in error, the application for that insurance, and authorized the statements therein contained; that neither the plaintiff in error

nor its general agents were at any time advised by Prindiville or by the defendant in error or by any other person that other insurance upon the property insured had been or was expected to be procured; that Prindiville received from the several companies, probably upon the same day, the policies for which he had applied, delivered them to the defendant in error and received from him the premiums. He thereupon paid to the general agents of the plaintiff in error the premium due to the company, and was allowed by the general agents a certain commission. The question, then, is (irrespective of the statute of the state of Illinois, which we will consider hereafter) whether Prindiville, by reason of the facts stated, was the agent of the insurance company in such manner and to such extent that the company is chargeable with the knowledge that he possessed of other insurance upon the property insured. We are of opinion that he was not, and that the insurance company was not bound by his knowledge. Unless the fact that he was allowed by the general agents a commission—a certain proportion of the amount which they received from the company for placing insurance—can be deemed to constitute him an agent, there is no color for declaring him such. It might with equal propriety be said that if the son of the plaintiff in error had, on behalf of his father, sought this insurance and that placed in other companies, the plaintiff in error would be chargeable with the knowledge that the son possessed of other insurance obtained by him for his father. The payment by the general agents to Prindiville of a certain share of the commissions which they were entitled to retain of the premium did not constitute him an agent of the company. That fact did not authorize him in any way to represent the company by his act, or to charge them with his knowledge. He never had been, and was not then, in the service of the in-

surance company. He was employed by the defendant in error. Prindiville made application for him, and made the representations and warranties in his behalf. The policy was delivered to Prindiville as the agent of the defendant in error. It does not matter that the general agents of the insurance company delivered the policy to Prindiville for the defendant in error without exacting payment of the premium at the moment. If they saw fit to trust either of them for the amount until Prindiville could hand to his principal the policy and receive the premium, that was their choice and risk. The policy was none the less delivered when it was handed to Prindiville as the agent of the defendant in error, and was in force from that moment. If the property covered by it had been destroyed before Prindiville had opportunity to hand the policy to his principal, it would have been a loss covered by this policy. It was effective according to its terms from the moment of the delivery of the policy to Prindiville. Upon the question whose agent was he, the fact that the general agents allowed to Prindiville a certain proportion of their commission for placing the insurance in their company, if coupled with other facts, might be of some avail in determining the question of agency; but, standing alone, it is without probative force.

Thus, the supreme court of Illinois has said, in *Insurance Co.* v. *Rubin*, 79 Ill., 404:

> "This supposed agent is Mr. Ludlum, who was not at that time nor at any other time, the appointed agent of the company. He was a man in the habit of picking up, as a broker on the street, any risk of which he might get information. It was on his application to appellee that the policy was written. After this, Ludlum took the application to the agent of the company, and obtained the policy in question. In this he was the agent of appellee, and not of appellant. The fact

that the agent allowed him a commission does not change the character in which he acted."

And so, also, in *Insurance Co.* v. *Brooks,* 83 Md., 22; 34 Atl., 373, the principle is thus stated:

"It appears to be well settled that, when one engages another to procure insurance, the person so employed is agent for the insured, and not for the insurer, in all matters connected with such procurement."

See also, *Insurance Co.* v. *Klewer,* 129 Ill., 599, 611, 22 N. E., 489; *Standard Oil Co.* v. *Triumph Insurance Co.,* 64 N. Y. 85; *Devens* v. *Insurance Co.,* 83 N. Y. 168; *Melten* v. *Insurance Co.,* 5 Duer, 101; *Insurance Co.* v. *Reynolds,* 36 Mich., 502; *Insurance Co.* v. *Hartwell,* 123 Ind., 177, 24 N. E., 100; *Hamblet* v. *Insurance Co.,* 36 Fed., 118; Ostr. Ins., Sec. 45; Mechem, Ag., Sec. 931; Whart. Ag., Sec. 708; May, Ins., Sections 122, 123.

We come, then, to the question whether, under the statute of the state of Illinois, Prindiville must be regarded as the agent of the insurer, and in what respect such agent, and whether his knowledge should be imputed to the insurer. In other words, has the statute, as between insurer and insured, worked any change in the law? The statute to which we are referred is part of chapter 73 of the Revised Statutes of Illinois, and is part of section 40. That section treats of the terms upon which foreign companies may be authorized to do business in the state of Illinois. It provides for the appointment of an attorney in the state upon whom process may be served, and that a written instrument certifying such appointment shall be lodged with the auditor of public accounts. It provides that a copy of the charter shall be filed with the auditor, for the deposit of certain securities by a company organized under any foreign government, and that it shall not be lawful for any agent to act for any

company referred to in taking risk or transacting the business of fire or inland navigation insurance in the state of Illinois without procuring from the auditor of public accounts a certificate of authority stating that the company has complied with the requisitions of the act, and providing a certain penalty for violation of the act. Then follows the provision in question:

> "Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the state or government under the laws of which it is organized. The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting insurance business of any insurance company not incorporated by the laws of this state."

The subsequent section of the chapter provides for revocation of the certificate by the auditor in case of false annual reports, for the examination by the auditor into the business of the company, and contains general provisions with respect to the inspection of state and foreign companies. The part of the statute quoted is the only provision to which we are referred, or which we have been able to find upon which is rested the contention that Prindiville is thereby created the agent of the insurance company.

It is apparent from the examination of the provisions of this chapter that the legislature of the state of Illinois is dealing with the relations which shall exist between foreign insurance companies and the authority of the state, and, as to them, declares what shall be done by such companies before they shall be authorized to do business within the state, or to continue the business of insurance under such authorization. It provides penalties for any infraction of the law. It sought to so hedge about the transaction of the business

of insurance that no foreign insurance company, by any cunning device, could overreach the statute and transact business within the state without compliance with the terms of the statute. It imposes penalties, not only upon the company which should so unlawfully transact business within the state, but, since the company was beyond the reach of its courts, like penalties were imposed upon any one within the state who should act for such company unlawfully transacting business within the state. And, that there might be no escape from compliance with the law, it was enacted that the term "agent," as used in the section in question, should include an acknowledged agent, surveyor, broker, or other person or persons who shall in any manner aid in transacting insurance business of any insurance company not incorporated by the laws of the state. Any such person was declared to be the agent of the company with respect to the penalties declared by the statute. This was done that there might be no evasion of the statute. This view of the sense in which the term "agent" is defined, and the purpose sought to be accomplished, throws light upon the decisions of the supreme court of Illinois which we are about to consider. The statute did not undertake to say that, as between the insurer and insured, one who acts for the insured in procuring insurance should be deemed to be the agent of the insurer.

The case of *People* v. *People's Ins. Exchange*, 126 Ill., 466, 18 N. E. 774, was an action brought in the name of the people to recover certain penalties provided by the section of the statute to which we have referred. The defendant was a corporation of Illinois, had an office in Chicago, and was engaged in soliciting and procuring insurance, delivering the policies and collecting premiums. It clearly ap-

peared that its actual business was to procure insurance for various parties in insurance companies doing business in other states which were not allowed to transact the business of insurance in the state of Illinois; and the defendant insisted that it acted, not as agent of the insurer, but as agent of the insured. It clearly was a case of an attempted evasion of the statute. It solicited the insurance. Policies were issued upon its representations to the foreign companies as to the condition and situation of the property proposed to be insured. The policies were sent by mail to the defendant, and by it delivered to the insured. It collected the premium, and remitted the same to the insurance companies, deducting the commissions. Clearly, it was the agent of the foreign companies, within the meaning of the statute, and properly subject to the penalties the statute imposed. As the court remarked:

> "Suppose the defendant corporation was not the agent of the foreign insurance companies in the ordinary sense of that term, still, if it in any manner aided these companies in the transaction of the business, it will, within the meaning of the act, be liable."

We certainly are not inclined in any way to dissent from that decision.

In *Insurance Co.* v. *Ruckman*, 127 Ill., 364, 20 N. E., 77, an action in chancery was brought by the insured for the reformation of a policy of insurance, and for a decree for the amount of the loss. Whipple and Smiley were the agents of the insurance company at Alton. Milne was in their service, and accustomed to solicit insurance for them. He solicited the insurance then in question, and assured the complainant that, if the insured premises did not remain vacant to exceed thirty days, the insurance would not be affected thereby, and agreed that the policies to be issued should so provide. On the following day, the complainant

applied at the office of Whipple and Smiley for the policy and found Milne there alone. The latter filled up a blank policy, delivered it to the complainant, and received from him the premium. The complainant was an illiterate man, being unable to read or write, which fact was known to Milne at the time. Upon being asked whether the clause in relation to the vacancy of the building was in the policy, Milne assured him that it was, and the complainant had no knowledge to the contrary until after the destruction of the buildings by fire. Here was clearly a case of fraud, and the policy was properly reformed to correspond with the contract made. And it is equally clear that Milne was authorized and accustomed to solicit and to make contracts of insurance. Having determined the case upon the ground that the act of Milne was the act of Whipple and Smiley, the agents of the company, and was within the authority which they had from the company, the opinion proceeded obiter to consider the statute in question. The writer of the opinion would seem to have inadvertently overlooked the sense in which the word "agent" is used in the statute, or the purpose for which it was employed. The opinion says properly enough that the general assembly had the undoubted right to make foreign companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents, and in fact aid them in the transaction of their insurance business, and then proceeds: "That such was the intention of the statute seems too plain to admit of doubt. We placed this construction upon said statute in *People* v. *People's Ins. Exchange*, 126 Ill., 466; 18 N. E., 774." As we have shown, that case was one between the people of the state and the Insurance Exchange, to enforce certain penalties of the statute, and is not authority for the assertion that as between insurer and insured the

statute made or designed any change in the law. It is proper also to observe that Milne was unquestionably authorized to solicit insurance by the general agents of the insurance company, and had authority to make the contract, and that, irrespective of any statute upon the subject; while, in the case with which we have to deal, Prindiville did not assume to act, nor did he aid them in the transaction of its insurance business, but acted for the insured. The opinion asserts authority for its conclusion in the respect mentioned in the decisions of the supreme court of Wisconsin upon the statute of that state. That statute differs widely from the Illinois statute, and does not treat alone of the relations between the state and the company, but is general. It is as follows (Rev. St. Wis., 1898, Sec. 1977):

> "Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation or advertises to do any such thing, shall be held to be an agent of such corporation, to all intents and purposes, unless it can be shown that he receives no compensation for such services."

Under this statute it is held that the rule was changed which required the insured at his peril to know whether the person with whom he is dealing had the power he assumed to exercise, or whether he was acting within the scope of his authority, and that one who procures policies from an authorized agent, delivers them, and collects and shares in the premium, is the agent of the company (*Schomer* v. *Insurance Co.*, 50 Wis., 575, 7 N. W., 544; *Knox* v. *Ins. Co.*, 50 Wis., 671, 7 N. W., 776); and that one who applies for

insurance, and delivers a policy in a company not represented by him, but by other agents, is its agent (*Alkan* v. *Ins. Co.*, 53 Wis., 136, 10 N. W., 91; *Body* v. *Ins. Co.*, 63 Wis., 157, 23 N. W., 132). But it is also held that the statute does not change the rule respecting the relations of principal and agent, and cannot be construed to prevent an insurance broker employed to procure insurance from another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies,—that the principal is bound by the acts and representations of the agent within the scope of his authority. *John R. Davis Lumber Co.* v. *Hartford Fire Ins. Co.*, 95 Wis., 226, 70 N. W., 84. The true meaning of the statute is well expressed in *Hankins* v. *Ins. Co.*, 70 Wis., 1, 35 N. W., 34: That the word "agent" is limited to the act of the particular person doing one or more of the things specifically designated; in other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the specific act thus authorized, and that the word "agent" as used in these statutes, means, as expressly stated in the Illinois statute, an authorized agent of the company.

In *Wood* v. *Insurance Co.*, 126 Mass., 316, it is said of a similar statute that the statute relating to agents of insurance companies does not change the relation of the common law regulating the power of agents to bind their principals, and that the statute cannot be construed so as to prevent the person who is agent for the insurer for some purpose by virtue of the statute, from being the agent of the insured for other purposes, and that he may well be the agent for each in matters which do not conflict.

We have here the acknowledged fact that Prindiville was

never employed by the plaintiff in error, nor authorized to act for it; that he was the agent of the insured in procuring the policy, and in the application which he made. If it may be said with respect to the actual delivery of the policy by him to the assured that he was therein the agent of the insurer, the knowledge which he had of other insurance, derived from his agency for the insured, is not chargeable to the insurer merely because the company authorized him to deliver the policy drawn in accordance with the contract made, and upon representations made by him as agent of the insured. See, also, Ostr. Ins., Sec. 40, where the statutes of the various states are reviewed.

We need not stop to consider the Iowa statute, which is widely different from that before us, nor refer to the case of *Bennett* v. *Insurance Co.*, 70 Iowa, 600, 31 N. W., 948, further than to say that in that case the agent of the company, having authority to solicit insurance and issue policies, sent his clerk to solicit a risk and take an application, and the clerk soliciting and taking the application knew of other insurance upon the property; and it was held—we think properly so—that the company was bound by the knowledge of the clerk, who must be regarded as the company's soliciting agent.

We recognize the rule that the federal courts are bound to follow that construction of a state statute which has been deliberately placed upon it by the court of last resort of such state. If we could find such deliberate holding and construction here, we should follow it, although it was opposed to our own views of the question. But we cannot say here that there has been any such deliberate construction of the statute. The only expression which in any way can be construed to militate with our own view, is, as we have shown, an obiter expression in an opinion, and that expres-

sion is not binding even upon the court in which it was rendered. We think the expression is manifestly inadvertent, and without consideration of the sense in which the term "agent" is employed in the statute. It is directly opposed to the construction placed upon much broader statutes by the supreme courts of Massachusetts and of Wisconsin, the latter of which is erroneously invoked as authority by the author of the expression which it is said should control our judgment. We cannot consider the inadvertent expression in that case as a deliberate decision, giving a settled construction to the statute.

It was urged at the hearing that the other insurance effected upon the property was contemporaneous with the insurance in question, and did not fall within the condition which rendered the policy void, "if insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy." The case of *Insurance Co.* v. *Davison*, 30 Md., 91, is relied upon to sustain this contention. We think the cases clearly distinguishable. There the plaintiffs applied to the defendant company, seeking their whole insurance from that company; and the latter company, before issuing its policy, and for its own convenience, and not at the request of either of the plaintiffs applied to the Maryland Company to share the risk. The premises were examined by the secretaries of the two companies together, with the view of taking the risk conjointly. Both policies, as originally drawn were alike, of the same date, for the same amount, and the premiums paid to both companies on the same date. The court says, on page 109:

> "It thus appears the Maryland policy was effected with full knowledge on the part of the defendant,—indeed, at its request and for its convenience; that both

> policies were precisely similar, and became effective and binding contracts at the same time. The proviso is that, 'if any other insurance has been or shall hereafter be made on the said property' without the consent of the company in writing indorsed thereon, the policy shall be void."

After observing upon the necessity of such clauses in policies of insurance, the court held that, under the circumstances stated, the policy in the Maryland Company was neither prior nor subsequent to the policy sued on, but took effect contemporaneously, and was not within the spirit or letter of the clause in question. Without undertaking to criticise the ground upon which that decision rested, it is enough to say that we fully concur in the result there reached. The Washington Company, having itself procured the issuing of this policy, was estopped, in our judgment, to assert the condition prohibiting other insurance, or must be deemed to have waived it. Possibly this would be the better ground upon which to have placed the decision. But the facts of the case are widely divergent from those here presented. We do not think that decision controlling or relevant here. We are satisfied that a correct result was arrived at in our previous decision.

It is proper to say that Judge SHOWALTER sat at the hearing, and is understood to have concurred in the result, but died before the preparation of this opinion.

The judgment is reversed, and the cause remanded to the court below, with direction to award a new trial.